

JAMES E C JESSE



FREEDOM OF SPEECH

AN APPRAISAL OF LAW AND PRACTICE IN THE LIGHT OF
INTERNATIONAL HUMAN RIGHTS LAW AND BEST PRACTICES

FOR MEMBERS
OF PARLIAMENT
IN TANZANIA

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Published by:

LawAfrica Publishing (K) Ltd
Co-op Trust Plaza, 1st Floor
Lower Hill Road
P.O. Box 4260 - 00100 GPO
Nairobi, Kenya
Phone: +254 20 2722579/80
Fax: +254 20 2722592

LawAfrica Publishing (T) Ltd
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P.O. Box 38564
Dar-es-Salaam, Tanzania
Phone: +255 22 2120804/5
Fax: +255 22 2120811

LawAfrica Publishing (U) Ltd
Crown House, 1st Floor Plot 4A,
Kampala Road
P.O. Box 6198
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Fax: +256 41 347743

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Website: <http://www.lawafrica.com>

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ISBN 9966-7237-3-0

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GENERAL INTRODUCTION

The idea of writing a work on the ‘Freedom of Speech for Members of Parliament in Tanzania’ did not emerge from abstract; rather it arose out of a concrete situation which happened in August 2007 in Tanzania’s Parliamentary House. The incident generated a political backlash. Noise was made, demonstrations were conducted and public rallies were held. Even those citizens who traditionally do not make follow up of politics became aware that something had happened. The news of the event occupied front page headlines of most dailies in Tanzania.¹

Briefly, the incident was that on 14 August 2007 a Member of Parliament (the “MP”) from the opposition camp, Honourable Zitto Kabwe, was suspended from the House on the grounds that he humiliated the then Minister for Energy and Mineral Minister, Honourable Nazir Karamagi (the “Minister”).² The alleged humiliation arose out of the debate in the House when the MP tabled a Private Motion proposing the formation of a parliamentary committee to investigate the mining contract which the Minister was alleged to have signed in London under dubious circumstances. This Motion triggered off heated debate in the House. One Member of Parliament from the ruling party proposed for the MP’s immediate suspension from the House for making unsubstantiated and malicious statements against the Minister. The proposal was endorsed by the Members of the House, whose majority are from the ruling party Chama Cha Mapinduzi. The Member of Parliament served a punishment of suspension for four months up to January 2008. We shall discuss in detail this case in Chapter 3.³

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- 1 See: Majira, 15 August 2007; Nipashe, 15 August 2007; Guardian, 15 August 2007, Swahili Times, Wednesday 15 August 2007; etc. All contained headings which say in Swahili, “*Zitto Kabwe Asimamishwa Ubunge!*” or in English “Kabwe Suspended.”
 - 2 Just a week after I started writing this work, Honourable Nazir Karamagi was pressured to resign by the Select Committee of the Parliament which investigated a controversial emergency power generation contract signed between the power company-TANESCO, which is under his Ministry- and Richmond Development Company LLC. In this saga the former Minister of the same Ministry, Honourable Ibrahim Msabaha, and the Prime Minister, Honourable Edward Lowassa, were also pressured to resign, and in fact resigned on Thursday 7 February 2008, after the Select Committee linked them up with a corruption atmosphere by giving the tender to Richmond Development Company LLC. Following the resignation of the Prime Minister the whole Cabinet had to be dissolved as per the requirement of the Constitution of the United Republic of Tanzania, article 57(2)(e). The Parliamentary Select Committee was formed late last year to find out the truth of the matter, and its report was tabled in Parliament on Wednesday, 6 February 2008.
 - 3 See: Chapter Three at section 3.3 *infra*, for more information on how the process of dismissal began and ended. As it would be seen there was a legal confusion in the Parliament. The situation was not supposed to happen the way it happened.

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It is enough to say here that this incident led to public outrage. There was public dissatisfaction against the move taken by the House in suspending the MP. Some people argued, *inter alia*, that the Parliament (in Swahili – “Bunge”) had unfairly punished the legislator so as to threaten MPs not to challenge the government,” a move described as against the principles of democracy, human rights and good governance.⁴

It is against this background that the author sought to investigate whether and to what extent the freedom of speech for Members of Parliament is guaranteed in Tanzania. Although the incident happened under the old Parliamentary Standing Orders (Kanuni za Bunge) this book will also try to see whether the new, Kanuni za Kudumu za Bunge, Toleo la 2007, has attempted to address the problems under the previous Standing Orders.

Indeed, the above incident acts as an entry point and a drive in undertaking this research. However, the objective is to shed light on the requirement of freedom of speech for Members of Parliament in any democratic society.⁵ While this work could undertake to research in general the right to freedom of opinion and expression⁶ in Tanzania, it does not intend to do so. The author is of the view that it will be inadequate and unfair to purport to address this broad subject of international human rights law, and of course, constitutional law, in a small and limited work like this one. Thus the most important aspects of this right will be highlighted. In this regard the freedom of opinion and expression will be examined briefly to provide the reader with the basics and the underlying framework for which the freedom of speech by Members of Parliament, which is the primary subject of this work.

United Republic of Tanzania is in East Africa and gained independence in 1961. It has a population of approximately 38 million.⁷ It is a multi-party political republic consisting of the Mainland Tanzania (formally known as

4 This, for example, was an observation made by Usu Malya, the Director of Tanzania Gender Networking Programme (TGNP) based in Dar es Salaam, quoted from the Guardian, 15 August 2007.

5 By democratic society we envisage a society which is governed and organized in a way that the following conditions are observed and respected: Respect for human rights and fundamental freedoms; access to and the exercise of power in accordance with the rule of law; the holding of periodic, free and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people; the pluralistic system of political parties and organizations; the separation of powers and independence of the judiciary; the promotion and practice of good governance by ensuring transparent and accountable administration; and, creation of conducive conditions for civil society organizations to exist and operate within the law.

6 This right is provided for under Article 19 of the Universal Declaration of Human Rights; Article 19 of the International Covenant on Civil and Political Rights, to mention just a few.

7 See: National Bureau of Standards (NBS), Tanzania National Projections. Information is available at <http://www.tanzania.go.tz> (last visited 26 March 2008). The last census in Tanzania was done in 2002 where the population was found to be 33, 461, 489 in accordance with the NBS.

Tanganyika before the union with Zanzibar in 1964) and the Zanzibar archipelago, a semi autonomous State within the Union making a unique union structure. It is unique in the sense that, while the Tanganyika Government was abolished after the Union in 1964 its counterpart, the Government of Zanzibar was retained. Hence, Zanzibar has its own President, the Judiciary and the Legislature which have mandate over all non-union matters.⁸ The Union Government is headed by the President who is the head of Government, the Head of State (Tanzania) as well as Commander in Chief. It has a unicameral legislative body the Parliament or the National Assembly. The last general elections were held in December 2005 where Jakaya Mrisho Kikwete of the ruling party, Chama Cha Mapinduzi (CCM), was elected the fourth President of Tanzania. In that same election the majority of Members of Parliament elected hailed from CCM.⁹

This work is organized as follows: The first chapter starts with the background information and legal analysis of the right to freedom of opinion and expression to build a foundation for the whole work. Chapter two is tailor-made to give a general overview of what freedom of speech for Members of Parliament. Chapter three captures the reader's attention to the legal framework and practice on freedom of speech for Members of Parliament and finally and finally Chapter four draws highlights the best practices from other countries.

8 On the part of Tanzania Mainland (former Tanganyika) it is the Union Government which exercises administrative, legislative and judicial powers thereby making the Union Government the government for the Union as well as the government for Mainland. See the Constitution of the United Republic of Tanzania, Article 34(1), (3). Currently there is a heated debate in the country whether Zanzibar is a State or not under this unique union structure following the remarks by the Prime Minister, Hon. Mizengo Pinda, that Zanzibar is not a State.

9 For a detail information on the Parliament of Tanzania see its official website at <http://www.parliament.go.tz/bunge>.

PREFACE

I would not probably have had the urge to write a book like this one, but for the profound inspiration and unceasing encouragement of my beloved teacher Dr Jean Marie Kamatali, the former Dean of the Faculty of Law, University of Rwanda. Dr Kamatali, who is now working with the Centre for Civil and Human Rights in the Law School of the University of Notre Dame (USA) scrupulously and tirelessly read this work from its draft form and provided me with very useful guidance and critical comments which have helped to shape this work. At no time did he say, 'I have no time to do it.' He would always ask what he could do to help me in my work and for that, I am grateful to him.

Much appreciation should also go to the US Fulbright Scholarship Program for sponsoring my studies in the United States of America at the University of Notre Dame. My heartfelt thanks go to the Center for Civil and Human Rights, in particular, Professor Douglass Cassel (Director) and Professor Sean O'Brien (Assistant Director), who host the program in International Human Rights Law in collaboration with the Law School of the University of Notre Dame. I extend my appreciation to the Center and the Law School in general because they broadened my academic horizon. I would fail in my duty if I did not acknowledge my gratitude to the authors, whose works I have consulted and whom I have cited in this work.

When I was researching and writing this book I was being driven by one most important thing the desire to shed light to our lawmakers and legal practitioners with regard to one of the most pivotal human right norm called, "the freedom of expression or speech." Although my work starts with the general framework of this right, the final objective is to show that parliamentarians have been given the broad mandate to speak their mind as they please for the betterment of the people they represent. The problem of the present day is that the freedom of speech in Tanzania is gaining grounds, but many people are unaware of the extent to which this freedom goes or to what extent the government is entitled to limit this right. The other important thing to note is the advantages or disadvantages of having freedom of speech. Tanzania is a signatory to almost all human rights conventions. Its esteem as far as ratifying international and regional treaties is held very high. But the question to ask is whether these treaties are brought back home, and how?

This book is the beginning of the author's journey towards discussing freedom of expression, speech, and information in Tanzania. Further research is underway which will eliminate in a comprehensive work on the right to freedom of expression and information in the country. The idea is to try to bring home the current position of international community with regard to this right. However, I should bring to light that some opinions in this book are personal to the author and should not be attributed to any person or organization. In the same breath, any shortcomings are mine.

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CHAPTER ONE

THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION

1.1 FREEDOM OF SPEECH (EXPRESSION) AS A GENERAL HUMAN RIGHT TO EVERY INDIVIDUAL

‘Freedom of speech’ is the right of being able to speak freely without censorship. In other words, it means the right to express opinions and ideas without hindrance, and especially without fear of punishment.¹ The synonymous phrase is ‘freedom of opinion and expression,’ which is mostly preferred. This latter phrase is preferred because this right is not confined to verbal speech but is understood to protect any act of seeking, receiving and imparting information or ideas, regardless of the medium used. The right to freedom of opinion and expression is among the human rights within the civil and political human rights plane.² This right is guaranteed in many international human rights instruments. It is stipulated in the Universal Declaration on Human Rights,³ (hereinafter “UDHR”) as well as in the International Covenant on Civil and Political Rights⁴ (“ICCPR”). It is also guaranteed by Article 5(d)(viii) of the International Convention on the Elimination of All Forms of Racial Discrimination⁵ (“ICERD”), and Article

1 See: Political Dictionary, available at <http://www.answers.com/topic/freedom-of-speech> (last visited 29 April 2008).

2 Other rights within this plane as per the International Covenant on Civil and Political Rights (ICCPR) include, but are not limited to, the right of self determination (Article 1), equality of men and women (Article 3), the right to life (Article 6), freedom against torture or cruel, inhuman or degrading treatment or punishment (Article 7), freedom against slavery, slave-trade or other form of servitude (Article 8), equality before the law (Article 14), freedom of thought, conscience and religion (Article 18), freedom of assembly and association (Articles 21, 22) to mention but a few.

3 Adopted and proclaimed by General Assembly resolution 217A (III) of 10 December 1948, See: article 19.

4 United Nations General Assembly resolution 2200A (XXI), UN Doc. A/6316 of 1966 entered into force on 23 March 1976, See: Article 19.

5 United Nations convention adopted and opened for signature and ratification by United Nations General Assembly resolution 2106 (XX) 21 December 1965, and which entered into force on 4 January 1969.

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13 of the Convention on the Rights of the Child⁶ (“CRC”). Regionally, the right to freedom of opinion and expression is guaranteed in: the African Charter on Human and Peoples’ Rights⁷ (“African Charter”), the American Convention on Human Rights⁸ (“ACHR”), and the European Convention on Human Rights⁹ (“ECHR”).

Freedom of expression in its different manifestations is the cornerstone of democratic rights and freedoms. In its very first session in 1946, before any human rights declarations or treaties had been adopted, the United Nations General Assembly adopted a resolution which states, *inter alia*, that, “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”¹⁰ The 1948 UDHR¹¹ – which was not intended to be a binding treaty¹² – contains wordings which parade the freedom of opinion and expression as an absolute right.¹³ However, the ICCPR which is a binding treaty and which obliges State Parties to undertake some responsibilities (the responsibility to promote; secure the fulfillment of; respect; ensure respect of; and protect human rights recognized in international law),¹⁴ contains more elaborate terms and limitation clauses as follows:

Article 19:

1. Everyone shall have the right to hold opinions without interference.

6 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force on 2 September 1990.

7 Adopted by the Organization of African Unity in Nairobi, Kenya on 27 June 1981, *See*: Article 9.

8 Adopted at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, 22 November 1969, *See*: Article 13.

9 Its full name is Convention for the Protection of Human Rights and Fundamental Freedoms; Adopted by the Council of Europe in Rome, 4 November 1950, *See*: Article 10.

10 In its very first session in 1946, the UN General Assembly adopted Resolution 59(I).

11 Although the UDHR is not a binding treaty but there is a consensus now that many of the norms embodied therein have acquired the status of customary international law since the Declaration was adopted by the United Nations without dissent.

12 The Resolutions of the General Assembly which are not treaties have no legally binding force for states and governments. However, they are nevertheless being used as authoritative sources of inspiration and carry the weight of world opinion on major international issues as well as the moral authority of the world community.

13 It states that: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” (Article 19).

14 *See*: article 2 of the ICCPR.

2. Everyone shall have the right of freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order, or of public health or morals.

What it means herein above is that “everyone” is guaranteed explicitly with the following rights:

- (i) an unfettered right to hold opinions;
- (ii) a right to express and disseminate any information or ideas;
- (iii) a right to have access to media; and
- (iv) a right to seek and receive information and ideas.¹⁵

These rights are collectively referred to as the right to ‘freedom of opinion and expression.’ According to the ICCPR, the preservation or denial of basic human rights is the province of states and government.¹⁶ If governments or their agencies deprive citizens of their basic rights, this deprivation is a human rights violation which makes the government liable. However, as it can be observed from the above provision this right is not absolute.¹⁷ Rather, the right may be enjoyed “subject to certain restrictions” as may be “provided by the law,” and which are “necessary” for the protection of rights or reputations of others, national security, public order, public health or morals. In other words, Article 19 does not bar the imposition of legal restrictions. Of course, if this was not the case some individuals could decide to exercise the right of freedom of opinion and expression to the detriment not only of others but of peace, harmony and security of the State.

It can be argued that there are no words which might be celebrated and enjoyed by a national government, which is unwilling to adhere to human

15 See: for example, the UN Human Rights Committee’s General Comment number 10, 29 June 1983.

16 See: generally the ICCPR starting from articles 2 to 51.

17 See: Henry Steiner and Philip Alston, *International Human Rights in Context*, (2 ed 2000) at 144 where the authors discuss some rights which are not absolute.

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rights (“laggard government” or “insincere government”), and particularly to the right of freedom of opinion and expression, like the limitation clauses found under Article 19(3) of the ICCPR. The reason is simple to find, namely, in any case where this right is restricted, ‘justifications’ will be found from the law. The government argument will readily be there the restriction is imposed by the law for the purpose of permissible limitations. The assumption is that the provisions of Article 19 of ICCPR allow wide latitudes for the states. When the freedom of opinion and expression is restricted, the government authorities will find justification from these words: it was ‘necessary’ in ‘national security,’ ‘public order,’ ‘protection of reputation,’ etc.

In the Report of the UN Special Rapporteur (SR),¹⁸ for the freedom of opinion and expression, Mr Abid Hussain,¹⁹ addresses, *inter alia*, trends noted in some countries with respect to violations of the right to freedom of opinion and expression. The report documents various actions taken by governments to curtail freedom of opinion and expression. It observes that the majority of cases continued to relate to violations and actions taken against media professionals. Similar actions and violations of rights also occur in relation to political groups and members of opposition political parties, human rights activists, lawyers, students, academics, trade unionists, persons participating in general strikes, women, members of religious and indigenous minorities, authors, and others.²⁰

The report continues to note that individuals seeking to exercise freedom of opinion and expression are frequently accused of: “denigrating and defaming government officials, military personnel or judicial authorities,” ‘propagating immoral, extremist and divisive ideas’, ‘collecting dissident news’, ‘publishing lies or false and insulting information’, ‘disturbing public order’, ‘criticizing religious and traditional practices’, ‘tarnishing the image of the country,’ ‘putting at risk the unity and best interest of the country’ or ‘spying for foreign nations.’²¹ The report elaborates that, in a large number of instances, the defence of national security as well as the argument of necessity

18 Special Rapporteur is a title given to individuals working on behalf of various regional and international organizations who bear specific mandates to investigate, monitor and recommend solutions to specific human rights problems.

19 See: the Commission on Human Rights, Report of the Special Rapporteur on Freedom of Opinion and Expression, 30 January 2002 found at www.hri.ca/fortherecord2002/Volume1/opinionchr.htm (accessed 1 February 2008).

20 *Ibid* paragraph 41.

21 *Ibid* paragraph 43.

continue to be frequently used by government authorities to silence or suppress independent media and to take punitive action against journalists, academics, activists, among other citizens who expressed their legitimate right to freedom of opinion and expression or who assembled peacefully to express concern or opposition to government decisions and actions.²²

It should clearly be stated that, truly there are situations where state actors can be justified to take the actions they might have taken in order to preserve the rights of others, national security, peace, order and the like. These are called permissible limitations.²³ The critique, however, is that there is inherent problem in many cases by the government actors in determining when those actions should be taken, how actions should be taken, and what should be the magnitude of punishment imposed in the event of breach. This definitely entails the importance of balancing rights of individuals with other interests.

While it is beyond the scope of this work to examine in detail the freedom of opinion and expression, the above factual background gives us a picture on how the law – under the banner of ‘necessity,’ ‘security of state,’ ‘protection of reputation,’ and ‘public order’ can sometimes be used by state actors to infringe rights which are guaranteed by the international human rights instruments. Diane Orentlicher argues that, if a state claims the right to derogate from international human rights standards because of a public emergency (or other factors), the important determination must be an assessment of whether the government’s action comports with applicable international standards governing the validity of such derogation.²⁴

The next part illustrates by case law how the courts have tried to grapple with the issue of balance.

1.2 JUDICIAL ANALYSIS OF FREEDOM OF OPINION AND EXPRESSION

As already noted, the right to freedom of opinion and expression is not absolute in any country. However, the degree of freedom varies greatly from one country to another. Industrialized countries also have varying approaches to balance freedom with order.²⁵ Probably, the country which has the best

22 *Ibid* paragraph 42.

23 See: Hurst Hannum, *Fact Finding by Non-Governmental Human Rights Organization*, (2004) at 294.

24 Diane F Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 HARV. HUM. RTS. J 83 (1990) at 97, See: footnote 49.

25 See: Various cases decided by the European Court of Human Rights. For example, *Handyside v United Kingdom*, 24 Eur. Ct. HR (ser. A), 1Eur. HR Rep. 737 (1976); *Lingens v Austria*, App.

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protection of this right is the US. For instance, the First Amendment to the United States Constitution theoretically grants absolute freedom.²⁶ The US courts have continued to guard jealously this right by insisting that where this right is limited the burden is upon the State to demonstrate when (if) a limitation of this freedom is necessary.²⁷ Similarly, in almost all liberal democracies, it is generally recognized that restrictions should be the exception and freedom of expression the rule; nevertheless, compliance with this principle is often lacking in many countries.

The Human Rights Committee of the ICCPR²⁸ stated that the right “to hold opinions without interference” guaranteed by Article 19(1) of the ICCPR “is a right to which the Covenant permits no exception or restriction.”²⁹ This is logical since it is impossible to control what goes on in a person’s mind,³⁰ as the freedom of expression is an outward manifestation of opinion, hence this right can be limited. The right to freedom of opinion and expression, as guaranteed by Article 19(2), is multi-dimensional and wide-ranging. It includes, freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [one’s] choice.” In its 1983 *General Comment* on this article, the Human Rights Committee noted that it is not sufficient for state parties to claim in their periodic reports³¹ that freedom of expression is guaranteed by the their Constitution or domestic law. The Committee demanded that ascertain the precise regime of freedom of expression in law and in practice, the Committee would, in addition to the pertinent information about the rules which either define the scope of

number 9815 of 1982, 8 Eur. HR Rep. 407 (1986); *The Sunday Times v United Kingdom* (II), Judgment of 26 November 1991, Series A number 217.

26 The First Amendment to US Constitution stipulates that “Congress shall make no law ... abridging the freedom of speech, or the press ...”

27 See: *Tinker v Des Moines Brandenberg v Ohio* *infra* notes 40 and 41, discussed hereunder.

28 A Committee established by article 28 of the ICCPR whose mandate is to monitor the implementation of the rights contained in the Covenant by the member states.

29 See: General Comment number 10 (Article 19) of the Human Rights Committee, in UN doc. United Nations Compilation of General Comments, paragraph 1.

30 University of Minnesota, Human Rights Library, Human Rights in the Administration of Justice, Chapter 12: “Some other Key Rights: Freedom of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly,” found at <http://www1.umn.edu/humanrts/monitoring/adminchap12.html> (accessed on 2 February 2008).

31 Human Rights Committee, General Comment 10, article 19 (Nineteenth session, 1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 11 (1994). See: paragraphs 3 and 4.

freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right.”³²

In order for the restrictions permitted by Article 19(3) of the ICCPR to be lawful, the Committee rightly noted that, restrictions on freedom of expression must comply with the principles of legality and proportionality and be imposed for one or more of the legitimate purposes enumerated in article 19(3). The rationale here is to avoid laws and practices which may be domestically ‘legal’ but are illegal under international law standards. The Committee has further emphasized that the right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise thereof must meet a strict test of justification.³³ The freedom of expression may, however, also be limited on the basis of article 20 of the Covenant, according to which ‘propaganda for war’ and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.³⁴ (These kinds of speech are generally called “hate speech”). We shall examine few situations under which the restrictions to the freedom of expression came under inquiry in domestic courts of law and then under international tribunals in order to see the standards that have been set.

1.2.1 Cases under the US Law

The freedom of expression in the US has been tested in courts over and over again. The path to realize this right has never been smooth.³⁵ It took nearly 200 years to establish firm constitutional limits on the government's power to punish “seditious” and “subversive” speech. Many people suffered along the way, such as labor leader *Eugene v Debs*, who was sentenced to 10 years in prison under the Espionage Act just for telling a rally of peaceful workers to realize they were “fit for something better than slavery and cannon fodder”. Sidney Street was jailed in 1969 for burning an American flag on a Harlem street corner to protest the shooting of civil rights figure, James Meredith.³⁶ Although indirectly, a turning point occurred in *Abrams v US*.³⁷ Despite the fact that the defendant's conviction under the Espionage Act for distributing

32 *Ibid* paragraph 3.

33 Communication number 628 of 1995, *T. Hoon Park v the Republic of Korea* (Views adopted on 20 October 1998) in UN doc. GAOR, A/54/40 (Volume II), at 91, paragraph 10.3.

34 University of Minnesota *supra* note 30.

35 See: for example Comments by the American Civil Liberties Union at: <http://www.aclu.org/freespeech/gen/11178pub19970102.html> (accessed 2 February 2008).

36 *Ibid*

37 250 US 616 (1919).

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anti-war leaflets was upheld, two dissenting opinions formed the cornerstone of interpretation of the US First Amendment law.³⁸ Oliver Wendell Holmes J and Louis D Brandeis J argued that speech could only be punished *if* it presented “a clear and present danger” of imminent harm. To use the words of Holmes J:

“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”³⁹

Mere political advocacy, they said, was protected by the First Amendment.

Eventually, these justices were able to convince a majority of the Court to adopt the “clear and present danger test”. Finally, in 1969, in *Brandenberg v Ohio*,⁴⁰ the US Supreme Court struck down the conviction of a Ku Klux Klan member, and established a new standard as follows: That, speech can be suppressed only if ‘it is intended, and likely to produce, imminent lawless action.’ The ‘*Brandenberg* standard’ prevails today and has been held by the courts that the First Amendment protection is not limited to “pure speech,” but rather it extends to books, newspapers, leaflets, and rallies. It also protects “symbolic speech” nonverbal expression whose purpose is to communicate ideas.

In its 1969 decision in *Tinker v Des Moines*,⁴¹ the US Supreme Court recognized the right of public school students to wear black armbands in protest of the Vietnam War. The case involved several students who were suspended from studies for wearing black arm-bands to protest the Vietnam War. The Supreme Court ruled that the school could not restrict symbolic speech that did not cause undue interruptions of school activities. Abe Fortas J wrote:

“Schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students ... are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State”.⁴²

38 Refer: *supra* note 26.

39 The “clear and present danger” test has consistently been used by Justice Holmes since the case of *Schenck v United States*, 249 US 47 (1919) and has been extended in *Debs v United States*, 249 US 211 (1919), again by Oliver Wendell Holmes J.

40 95 US 444 (1969).

41 393 US 503 (1969).

42 However, this decision was arguably undermined, by *Bethel School District v Fraser* 478 US 675 (1986), in which the Court held that under certain circumstances a student could be punished for his speech before a public assembly.

In 1989 in the case of *Texas v Johnson*⁴³ and again in 1990 in *US v Eichman*,⁴⁴ the Court struck down government bans on “flag desecration.” When the issue of flag burning as a form of protest came before the Supreme Court in *Texas v Johnson*, the Supreme Court reversed the conviction of Gregory Johnson for burning the flag by a vote of five to four. Justice William J Brennan, Jr. asserted that “if there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.” Many Congressmen criticized the decision of the Court; and the House of Representatives⁴⁵ unanimously passed a resolution denouncing the Court. Congress passed a federal law barring flag burning, but the Supreme Court struck it down as well in *United States v Eichmann*. Many attempts have been made to amend the Constitution to allow Congress to prohibit the desecration of the flag. Since 1995, the Flag Burning Amendment has consistently mustered sufficient votes to pass in the House of Representatives, but not in the Senate. In 2000, the Senate voted 63–37 in favor of the amendment, which fell four votes short of the requisite two-thirds majority. In 2006, another attempt fell one vote short.⁴⁶

Other examples of protected symbolic speech include works of art, T-shirt slogans, political buttons, music lyrics and theatrical performances.⁴⁷ Government can limit some protected speech by imposing the time, place and manner restrictions.⁴⁸ This is commonly done by requiring permits for meetings, rallies and demonstrations. “Permits cannot be unreasonably withheld, nor can they be denied based on content of the speech. That would be what is called viewpoint discrimination – and *that* is unconstitutional,” argues the American Civil Liberties Union.⁴⁹ However, when a protest crosses the line from speech to action, the government authorities can intervene more aggressively. In this respect, political protesters have the right to picket, to

43 491 US 397 (1989).

44 496 US 310 (1990).

45 The United States House of Representatives is one of the two chambers of the United States Congress; the other is the Senate. Each state receives representation in the House proportional to its population but is entitled to at least one Representative; the most populous state, California, currently has 53 representatives. The total number of representatives is currently fixed at 435. Please visit <http://www.house.gov/> However, in the Senate each state is entitled to two Senators regardless of the state's population.

46 For details information you can see First Amendment to the United States Constitution, by visiting: <http://www.ala.org/ala/oif/firstamendment/firstamendment.fgm> (accessed 5 May 2008).

47 American Civil Liberties Union *supra* note 35.

48 These are regulations which are commonly made in the US governing time, place and manner of meetings, assemblies or demonstrations.

49 See: American Civil Liberties Union *supra* note 35.

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distribute literature, to chant and to engage passersby, in debate, but they do not have the right to block building entrances or to physically harass people.⁵⁰

Although content-based restrictions on speech in the public forum are subject to strict judicial scrutiny (usually a requirement that the restriction serve a compelling state interest and that there is no way of serving the interest that is less speech-restrictive), content-neutral restrictions on speech are subject to only intermediate scrutiny. In general, the government must show that the law serves an important objective (not involving the suppression of speech), that the law is narrowly tailored, and that there remain ample alternative means of communication.⁵¹

With regard to the protection of the media, in particular, the American Supreme Court has had an opportunity to set the standards. We shall examine few of them here. It should be borne in mind, at the outset, that just like many countries which have been influenced by the English legal system, America has no exception. Its tort law, for creating liability for defamatory speech or publications slander and libel traces its origins from English law. Freedom of the press, like freedom of speech, is subject to restrictions on bases such as defamation law. Restrictions, however, have been struck down if they are aimed at the political message or content of newspapers.

In fact, the nature of American defamation law was vitally changed by the Supreme Court in 1964, in deciding the *New York Times Company v Sullivan* case.⁵² The New York Times had published an advertisement indicating that officials in Montgomery, Alabama, had acted violently in suppressing the protests of African-Americans during the Civil Rights Movement. The Montgomery Police Commissioner, LB Sullivan, sued New York Times for libel on the grounds that the advertisement damaged his reputation. The Supreme Court unanimously overruled the \$500 000 judgment against the newspaper. Justice William J Brennan suggested that public officials may sue for libel only if the publisher published the statements in question with “actual malice” – that means, with the knowledge that it was false or with reckless disregard of whether it was false or not;⁵³ which of course is a difficult standard to meet. The actual malice standard applies to both public officials and public

50 *Ibid.*

51 See: A more recent decision in the case of *Watchtower Bible and Tract Society v Stratton*, 36 US 150 (2002).

52 376 US 254 (1964).

53 *Ibid.*

figures, including celebrities. Though the details vary from state to state,⁵⁴ it is now a generally acceptable standard that private individuals normally need only to prove negligence on the part of the defendant.⁵⁵ But, the Supreme Court again ruled in *Gertz v Robert Welch, Inc.*,⁵⁶ that opinions cannot be considered defamatory. It is therefore permissible to suggest, for instance, that a lawyer is a bad one, but is not permissible to declare that the lawyer is ignorant of the law. The difference here is that the former constitutes a statement of values (opinion), but the latter is a statement alleging a fact. However, more recently, in *Milkovich v Lorain Journal Company*,⁵⁷ the Supreme Court backed off from the protection of “opinion” announced in *Gertz*. The *Milkovich* court specifically held that there is no wholesale exemption to defamation law for statements labeled “opinion,” but instead that a statement must be proved to be false (falsifiable) before it can be the subject of a libel suit.

The above case law analysis has shown that the right to free speech, although subject to restrictions, can only be restricted in very exceptional situations in the US.

While it is not intended to discuss all situations where the freedom of expression has been upheld and restricted, a few landmark situations are worth noting here. A well-known example is typified by the statement that free speech does not allow falsely “shouting fire in a crowded theatre and causing panic” (*Schenck v United States*)⁵⁸. Other examples include, “fighting words” those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,⁵⁹ or words which incite people to overthrow the government. In one case the Supreme Court held that: “No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence.”⁶⁰

54 United States of America is composed of the Federal Government divided into 50 semi-autonomous states.

55 In *Greenbelt Cooperative Publishing Association, Inc. v Bresler*, 398 US 6 (1970) the Supreme Court ruled that an article which quoted a visitor to a city council meeting who didn't like Bresler's aggressive stance in negotiating with the city as "blackmail" to not be libelous since nobody could believe anyone was claiming that Bresler had committed a crime and that the statement was essentially hyperbole, i.e. obviously an opinion.

56 418 US 323 (1974).

57 497 US 1 (1990).

58 249 US 47 (1919).

59 See: *Chaplinsky v New Hampshire*, 315 US 568 (1942).

60 In *Dennis v United States*, 341 US 494 (1951), one of the “acts” which the Court found the government could prohibit was to knowingly and willfully “advocate and teach the duty and

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Another area which is more controversial is obscenity.⁶¹ In fact, the federal obscenity law in the US is highly unusual in that not only is there no uniform national standard, but rather, there is an *explicit* legal precedent (the “*Miller test*”), which states that something that is legally “obscene” in one jurisdiction may not necessarily be in another. Former Potter Stewart J of the Supreme Court of the United States, in attempting to classify what material constituted exactly “obscenity,” famously wrote:

“I shall not today attempt further to define the kinds of material I understand to be embraced ... [b]ut I know it when I see it ...”⁶²

In *Miller v California*,⁶³ the Supreme Court established a three-tiered test to determine what is obscene – and thus not protected, versus what is merely erotic and thus protected by the First Amendment. Delivering the opinion of the Court, Chief Justice Warren Burger wrote:

The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

In US legal texts, therefore, the question of “obscenity” as of now refers to this “*Miller test obscenity*.” The Supreme Court has ruled that it is constitutional to legally limit the sale, transport for personal use⁶⁴ or other transmission of obscenity, but that it is unconstitutional to pass laws concerning the personal possession of obscenity *per se*.

1.2.2 Cases from International/Regional Human Rights Bodies

It is very important to discuss some cases from the International/Regional human rights bodies which have attempted to define the broader terms of article 19 of the ICCPR and similarly situated provisions of regional human

necessity of overthrowing and destroying the Government of the United States by force and violence”.

61 “Obscenity,” in Latin *obscenus*, meaning “foul, repulsive, detestable”, possibly derived from *obcaenum*, literally “from filth”, is a term that is most often used in a legal context to describe expressions (words, images, actions) that offend the prevalent sexual morality of the time.

62 See: *Jacobellis v Ohio*, 378 US 184, 197 (1964).

63 413 US 15 (1973).

64 See: for instance, *US v Extreme Associates*. Obscene articles are generally prohibited entry to the United States by US Customs and Border Protection Form 6059B, January 2004.

rights instruments to enable us to appreciate the scope of the right of freedom of opinion and expression and limitations thereof in the international human rights plane. As pointed out earlier, the Human Rights Committee commented that the restrictions permitted by Article 19(3) of the ICCPR must comply with the principles of legality and proportionality and be imposed for one or more of the legitimate purposes enumerated in Article 19(3).

It can legitimately be claimed, therefore, that although limitations on free expression are allowed under international law, they are simply exceptions to the universal right of free expression. The European Commission on Human Rights, in *Handyside v United Kingdom*,⁶⁵ qualified the restriction clause of ECHR- Article 10(2) as that of a mere exception to the general rule of free speech,⁶⁶ and that these restrictions can only limit freedom of expression to the extent outlined in the applicable treaty or covenant. In *Vogt v Germany*,⁶⁷ the Grand Chamber of the European Court of Human Rights ruled that restrictions placed on a guaranteed freedom (this means any permissible restriction to any right and freedom) are to be strictly construed and must be analyzed under a three step process as follows:

First, the state must offer proof to show that the restriction is provided for in the law; that means, such restriction is defined clearly and with sufficient precision by a statute or by the courts in a way that allows a citizen to adapt his behavior and to reasonably foresee the consequences that a certain action may carry if he violates that law. Secondly, if the Court holds that the interference is in fact provided for in the law, the next burden of proof, which the state must discharge, is to show that the interference/restriction has a legitimate purpose according to the second paragraph of Article 10, with respect to national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or maintaining the authority and impartiality of the judiciary. Thirdly, if the second criterion is also met the Court must then evaluate whether the interference is necessary in a

65 (5493/72) [1976] ECHR 5 (7 December 1976).

66 Article 10(2) of the ECHR permits a broader range of restrictions, such as allowing states to protect their territorial integrity, prevent the disclosure of confidential data, and secure the judiciary's integrity.

67 Judgment of the Grand Chamber of the European Court of Human Rights of 26 September 1995, Series A number 323.

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democratic society. Antonella Mularoni J⁶⁸ argues that:

Usually, the third element is the most contested aspect of litigation (because the existence of the first two elements is often hardly contestable), and it is also this aspect that is the most delicate for the Court. The Court is essentially called to evaluate if a just balance has been observed between the plaintiff's freedom of expression and the needs of the State defendant with respect to the restrictions on the freedom of expression provided for in the second paragraph of Article 10. On this subject, the nature and strictness of the sanction imposed on the plaintiff are factors that the Court takes into consideration.⁶⁹

In this case (*Vogt v Germany*) the European Court of Human Rights found Germany in breach of its responsibilities to a citizen (Dorothea Vogt, a dismissed teacher who was an active member of the German Communist Party) under Article 10 (right to freedom of expression) and Article 11 (right to freedom of assembly and association) of the ECHR. The government subsequently settled with her, providing compensation for her time without full earnings, topping up her pension rights for that period, as well as other modest damages and costs.

It is argued also that the ECHR Article 10(2) permits restrictions on speech that is blasphemous. But, this restriction does not imply that governments may restrict all blasphemous speech. Only such speech that threatens democratic society can be restricted.⁷⁰ If, for example, the restriction has affected the freedom of the press and consequently the press has been punished for violation of that restriction "the Court [can] ensure that the sanction is not so harsh as to dissuade the press from partaking in the discussion on issues of public interest," Antonella Mularoni J.⁷¹ The fact that

68 Antonella Mularoni, The Society of Information: Freedom, Pluralism, Resources; Freedom of Expression: Recent Case Law of the European Court of Human Rights, *Southern Illinois University Law Journal* [Volume 30] at 417. Formally it was a Report presented at the September 2005 Conference "*La società dell'informazione: libertà pluralismo risorse*" in the Republic of San Marino. Antonella Mularoni is a judge of the European Court of Human Rights.

69 *Ibid* at 419.

70 The best example of the case in which the European Court of Human Rights upheld limitation imposed on the freedom of expression is the case of Refah Partisi (*The Welfare Party and others v Turkey*, application numbers 41340 of 1998, 41342 of 1998, 41343 of 1998 and 41344 of 1998). In this case the Grand Chamber of the European Court of Human Rights found that the dissolution of Refah as a political party in Turkey and the banning of its leaders from holding similar office in any other political party and participating in elections for a period of five years was justified under proportionality test and was necessary in a democratic society within the relevant articles of the European Convention of Human Rights.

71 *Supra* note 68.

courts pay a great deal of attention to freedom of the press does not mean, however, that journalists do not face limitations in exercising their rights. Journalists must also act in good faith “in providing accurate and reliable information in accordance with the ethics of journalism”.⁷²

The courts have strongly established the importance of the media's role in being able to report freely on matters of public interest. It is tempting to provide at least an example of a case⁷³ to see how the European Court has dealt with the issue of freedom of the press. The best example is the Grand Chamber's judgment in the case of *Cumpana and Mazare v Romania*.⁷⁴ The plaintiffs were two professional journalists who wrote an article with a matching cartoon parody. For this article and cartoon, they were sentenced to prison for seven months for the crime of defamation, deprived of their civil rights, and had their journalistic license suspended for a year.⁷⁵ Not only were they subjected to a criminal penalty and deprived of their civil rights, but also, they were sentenced to a fine for damages, plus interest, in favor of the injured party for moral prejudice.

The Court declared, first of all that, “although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence”.⁷⁶ Similarly, an injunction prohibiting a journalist from working at all must be subjected to close scrutiny and is justified only in exceptional circumstances. The press, in fact, must be able to perform the role of a public watchdog in a democratic society.⁷⁷ The Court held that in this case nothing justified the sentence of imprisonment, the deprivations of their civil rights, nor the suspension of their journalist license.⁷⁸ In conclusion, the Court held that the plaintiffs' “criminal sanction and the accompanying prohibitions imposed on them by the national courts were manifestly disproportionate in their nature and severity to the legitimate aim pursued by the plaintiffs’

72 *Colombani v France*, application number 51279 of 1999, £65, 2002–V Eur. Ct. HR (2002); see also *Radio France v France*, application number 53984 of 2000, 2004–II Eur. Ct. HR, 40 Eur. HR Rep. 29 (2004).

73 For detailed analysis and examples of cases see Antonella Mularoni, *supra* note 68.

74 Application number 33348 of 1996, 41 Eur. HR Rep. 14 (2005).

75 *Ibid* at paragraph 37.

76 *Ibid* at section 115.

77 *Ibid* at section 119.

78 *Ibid* at section 116–22.

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conviction for insult and defamation”⁷⁹ and that “the domestic courts ... went beyond what would have amounted to a ‘necessary’ restriction on the applicants’ freedom of expression.”⁸⁰

The right to freedom of opinion and expression in the Organization of American States (OAS) is also guaranteed. The American Declaration of the Rights and Duties of Man stipulates that: “Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever”.⁸¹ Similarly, the American Convention on Human Rights⁸² states that: “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.” In invoking these provisions the Inter-American Court of Human Rights has followed suit to the European Court of Human Rights. In one case it held that, “it can be said that a society that is not well informed is not a society that is truly free”.⁸³ It has also stated that, “For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion.”⁸⁴ “As to the scope of freedom of expression and information, the Court stated the following:

... those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds... [Freedom of expression] requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.⁸⁵

Before we close this Chapter, it is also instructive to examine the situation in Africa and discuss at least two cases. One is a case decided by the African

79 *Ibid* at section 120.

80 *Ibid* at section 121.

81 Article IV.

82 Article 13.

83 Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (articles 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85 of 13 November 1985, paragraph 70.

84 *Ibid* paragraph 32.

85 *Ibid* paragraph 30.

Commission on Human and Peoples' Rights ("the African Commission" or "the Commission") and another by the High Court of Zimbabwe. In the process of articulating the freedom of opinion, expression and information, the African Commission meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17 to 23 October 2002, decided to adopt a resolution on the freedom of expression in Africa.⁸⁶ The Resolution states, *inter alia*, that: "Reaffirming the fundamental importance of the freedom of expression as an individual human rights, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedom",⁸⁷ and "Recognizing the need to ensure the right to freedom of expression in Africa, the African Commission on Human and Peoples' Rights declares that:"⁸⁸

1. No one shall be subject to arbitrary interference with his or her freedom of expression.
2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary (and) in a democratic society.⁸⁹

These words clearly show that the African Commission cherishes the right of freedom of expression and information like other regional human rights bodies. In the case of *Media Rights Agenda and others v Nigeria*,⁹⁰ the Commission was asked to determine the validity of the Nigeria Decree⁹¹ which had the following provision:⁹² "It is an offence, punishable with either a fine of N250,000 or imprisonment for a term of 7 years or both for a person to own, publish or print a newspaper not registered under the Decree. The registration of existing newspapers under a previously subsisting law (the Newspaper Act) is extinguished by the Decree."⁹³ In addressing this issue the Commission stated a general principle that applies to all rights, not only the

86 ACHPR/Res.62 (XXXII) 02: Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, done in Banjul, 23 October 2002.

87 *Ibid* paragraph 1 of the Preamble.

88 *Ibid* paragraph 12.

89 *Ibid* article 1.

90 African Commission on Human and Peoples' Rights Comm. numbers 105/93, 128/94, 130/94 and 152/96 (1998).

91 The Newspaper Decree number 43 of 1993.

92 After the annulment of the Nigerian elections of 12 June 1993, several decrees were issued by the government. For example, the Constitution (Suspension and Modification) Decree number 107 of 17 November 1993 Article 5 specified that: "No question as to the validity of this Decree or any other Decree made during the period 31 December 1983 to 26 August 1993 or made after the commencement of this Decree or of an Edict shall be entertained by a court of law in Nigeria". It was on the basis of this law that The Newspapers Decree number 4 of 1993 was challenged before the African Commission.

93 The Newspaper Decree, section 7.

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freedom of expression. We consider this principle as sound with regard to human rights protection. For purpose of clarity we quote it:

Governments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.⁹⁴

According to Article 9.2 of the [African] Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law or the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.⁹⁵

In its overall assessment of the facts and law the Commission declared the Nigerian law to have violated Articles 9.1 and 9.2 of the African Charter on Human and Peoples' Rights which provides for the freedom of expression and information.

The High Court of Zimbabwe, on its part, in *Nyanabirai v National Society Security Authority and another*,⁹⁶ decided to set the standards at which any national law which tries to limit the right of freedom of expression should be evaluated. The tests are more or less the same as those set by the European Court of Human Rights and the Inter-American Court of Human Rights. According to the Court, a legislative instrument can only be valid if: (i) the legislative objective is sufficiently important to justify limiting the right; (ii) the measures designed to meet the legislative objective are rationally connected to it and; (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

These cases have provided a clear testimony that there already exists under international law a broad consensus on the basic content of fundamental human rights. That, even where certain specific rights allow for some restrictions for which states can exercise discretion to limit the rights - this discretion is called a 'margin of appreciation' - the limitations cannot be done

94 Media Right case paragraph 65 *supra* note 90.

95 *Ibid* paragraph 66.

96 [1995] Volume 2 Zimbabwe Law Reports, at 1(S).

arbitrarily or whimsically. Courts of law have repeatedly stressed that any restriction or limitation to human rights must be legally tailored to ensure 'legitimate state interest,' and that the evils of limitations of rights must be 'strictly proportionate with' and 'absolutely necessary' for the advantages which are to be obtained in a 'democratic society'.⁹⁷

1.3 THE RATIONALE FOR FREEDOM OF OPINION AND EXPRESSION

The trinity of freedom of opinion, expression and information constitutes a centre of gravity in international human rights norms⁹⁸. The importance of this polyvalent right to democracy, it is argued,⁹⁹ is foundational; empowering; enlightening; and facilitative. Its cardinal importance for individual self-fulfilment; advancement of knowledge and attainment of truth in society; participation in democratic politics; promotion of transparency in government and of a fair and open legal system, is uncontested.¹⁰⁰ As it was noted earlier, the first ever United Nations General Assembly Resolution referred to the right to freedom of opinion and expression as the touchstone of all human rights, given its critical importance in democracy and public participation in political life to all people regardless of their status in life. This claim can further be advanced by examining the rationale behind it. There are many theories that have been advanced seeking to justify the right to freedom of opinion and expression. In a nutshell, the justification for freedom of expression is a general liberal or libertarian presumption against coercing individuals from living how they please, and doing what they want.

Perhaps, there are no better words to explain the important justifications (i.e., theories) for the freedom of opinion and expression than the words used by McLachlin J of the Canadian Supreme Court. He identified the following theories in *R v Keegstra*,¹⁰¹ a case on hate speech. He noted:

1. Free speech promotes 'the free flow of ideas essential to political democracy and democratic institutions' and limits the ability of the state to subvert other rights and freedoms.

⁹⁷ See: generally all cases discussed in this Part.

⁹⁸ See: all the international and regional treaties which provide for these rights collectively, *supra* notes 13-9.

⁹⁹ Tarlach McGonagle, *Wresting (Racial) Equality from Tolerance of Hate Speech*, (2001) 23 Dublin University Law Journal (ns) 21, at 21.

¹⁰⁰ *Ibid*

¹⁰¹ [1990] 3 SCRR v Keegstra 697.

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2. It promotes a 'marketplace of ideas,'¹⁰² which includes, but is not limited to, the search for truth.
3. It is intrinsically valuable as part of the self-actualization of speakers and listeners.
4. It is justified by the dangers for good government of allowing its suppression.

While these justifications may be overlapping and interrelated, it can be argued that justifications for guaranteeing freedom of expression are categorized into three, namely: for discovering the truth, to advance autonomy of the individuals (self-governance) and, to promote tolerance. This means that, through the freedom of the press and the freedom of the people to hold various opinions the truth to various issues can be discovered. This is what Justice Holmes refers to as "marketplace of ideas."¹⁰³ As it can be gleaned from the language of human rights instruments which guarantee the right to freedom of opinion and expression, this right applies not only to one's own right and freedom to express own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas.

In fact, the freedom of expression helps individuals to obtain information, assisting in the discovery of the truth while giving self-fulfillment.¹⁰⁴ This in turn helps in strengthening the capacity of the individual to participate in decision making and hence carry forward the objectives of democracy. Equally important, the freedom of expression enables the public to freely criticize the conduct of those who exercise state power or authority. In *Derbyshire CC v Times Newspapers Limited*,¹⁰⁵ Keith LJ observed that it was of the highest public importance that a democratically elected governmental body, or indeed any governmental body, be open to uninhibited public criticism. This claim is to say that tolerance on the part of the government is very essential because it is through criticism that the government may be able to realize what the wishes of its people are. Such tolerance serves as a model that encourages more tolerance of others. The European Court of Human

102 It was Holmes Jin the case of *Abrams v United States*, 250 US 616 (1919), who for the first time started to invoke the powerful metaphor of the "marketplace of ideas."

103 *Ibid.*

104 See: *Munhumeso and others* 1994 (1) Zimbabwe Law Reports 49 at 56.

105 [1993] 1 All ER 1011.

Rights has this to say:

Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions of its progress and for the development of every man ... It is applicable not only to information or ideas that are favorably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.¹⁰⁶

It can, therefore, be submitted that the right to freedom of opinion and expression upholds the rights of all to express their views and opinions freely. It is essentially a right which should be promoted to the maximum extent possible given its critical role in democracy and public participation in political life. However, there may be some views which incite intolerance or hatred between groups. This raises the debate about whether such 'hate speech' should be restricted. An extreme example of this is the use of the mass media to promote genocide or racially-motivated attacks, such as the role played by Radio-Télévision Libre des Milles Collines (RTLM), Kangura Newspaper and other media¹⁰⁷ in the Rwandan Genocide in 1994.¹⁰⁸ In these kinds of extreme situations there is a legitimate interest and necessity of preventing them as soon as they occur in order to preserve the peace and harmony of the society.

Today, as we cherish freedom of speech, it should be known that the adoption of it was fought for and gained by the British Parliament in 1689 through the English Bill of Rights enacted in 1689.¹⁰⁹ Through this Bill Members of Parliament were able to speak their mind without hindrance.

106 In *Handyside v US* [1979-1980] 1 EHRR 737, paragraph 49.

107 For some detailed explanation on the role played by the media for purpose of furthering genocide in Rwanda see Jean Marie Kamatali, *Freedom of Expression and Its Limitations: The Case of the Rwandan Genocide*, 38 STAN J INT'L L. 57 (2002).

108 The trial against "hate media" began on 23 November 2000 at the ICTR. It is charged with the prosecution of the media which encouraged the genocide of 1994 in Rwanda. On 19 August 2003, at the Tribunal in Arusha, life sentences were requested for Ferdinand Nahimana, and Jean Bosco Barayagwiza, persons in charge for the Radio Télévision Libre des Mille Collines, as well as Hassan Ngeze, director and editor of the Kangura newspaper. They were charged with genocide, incitement to genocide, and crimes against humanity, before and during the period of the genocide of 1994. On 3 December 2003, the Tribunal found all three defendants guilty and sentenced Nahimana and Ngeze to life imprisonment and Barayagwiza to imprisonment for 35 years. The three of them appealed to the ICTR Appeal Chamber and the judgment was delivered on Wednesday 28 November 2007. The Appeal Chamber upheld partly some grounds of appeal and substituted the appellants' sentences as follows. For Nahimana and Ngeze their life imprisonment sentences were reduced to 30 and 35 years prison terms respectively. For Barayagwiza his 35 year-imprisonment term was substituted for a prison term of 32 years.

109 See: David S Bogen, *The Origins of Freedom of Speech and Press*, Volume 42, 429 Maryland Law Review, 1983.

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This freedom was coupled with Parliamentary privileges which prevented any person or the Crown from taking any legal action against any Member of Parliament for anything said by that member.¹¹⁰ David Bogen argues that, “the major contribution of parliamentary privilege to the concept of freedom of speech is recognition that protection of speech is needed for the successful operation of the political process and the preservation of self-government.”¹¹¹ Thus, when the freedom of speech was extended to the general public, the underlying basis was to advance autonomy of the individuals (self-governance) which is very important in any democratic society.

Having seen how the general individual freedom of expression is being provided and protected by the international instruments and the jurisprudence of various bodies this is the now opportune time to see the freedom of speech for Members of Parliament under which the general freedom of expression was derived.

110 *Ibid* at 434.

111 *Ibid* at 435.

CHAPTER TWO

FREEDOM OF SPEECH FOR MEMBERS OF PARLIAMENT

2.1 INTRODUCTORY REMARKS ON FREEDOM OF SPEECH FOR MEMBERS OF PARLIAMENT

When the term ‘freedom of speech’ is used to refer to the rights of Members of Parliament it essentially entails the most important right accorded to members of the House in the exercise of their duty in parliamentary proceedings, namely, the freedom to speak freely.¹ In order to protect Members of Parliament many legal systems of the world do provide a principle called “parliamentary privileges” and/or “parliamentary immunity”.² The principle of parliamentary immunity is designed to ensure the proper operation of parliament. It confers specific rights and privileges to members of parliament the most important of all being the freedom of speech.³

Obviously, as we have already seen in Chapter one, the international human rights instruments provide for this right of freedom of speech or expression to everybody since this right is necessary to a human personality. With regards to Members of Parliament, whatever the general state of this freedom is, there should be full freedom of speech in parliament and particularly for its members for the reasons that we shall explain here. Freedom of speech is the working tool of Members of Parliament which enables them to exercise their duty as representatives of the people, legislating,

1 See: Mathew R Walker, *Constitutional Law Narrowing the Scope of Speech or Debate Clause Immunity United States v McDale*, 28 F.3d. 283 (3d Cir. 1994), cert. denied, 1995 US LEXIS 1841 (US 6 1 March 1995) 68 TEMPLE L. REV. 377 (1995).

2 See: Robert Myttenaere, *The Immunities of Members of Parliament*, in *Constitutional and Parliamentary Information*, number 175-1st Half-year 1998/ASGP Review. Available at: <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMSZFAGOKNXL.pdf> (accessed 1 March 2008).

3 See: UNDP, *Parliamentary Immunity*, A background paper prepared by the Inter-Parliamentary Union: UNDP Initiatives of Parliament, Crisis Prevention and Recovery, in Association with the Inter-Parliamentary Union, September 2006 at 2.

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adopting the budget and overseeing⁴ the activities of the government. The wisdom of the law in providing protection is to afford them an opportunity to express themselves and allay to the government the concerns of the people without obstruction and fear of prosecution or harassment.⁵ A logical conclusion is that the freedom of speech (or expression) for members of parliament, actually, is not distinct from that enjoyed by all other persons. The only difference is that the freedom of speech for members of parliament, while they are in the parliament house, is more enhanced than that of other people.⁶ The law provides them with absolute immunity.⁷ Whatever they say, even if it hurts or injures other individuals or the state, they cannot be held liable. In other words, their freedom is not limited by the law, except that as people whom their esteem is held high they are required to observe some ethical standards which prevent them from abusing their freedom of speech in order to protect the high standing of Parliament and to ensure that it may discharge, with the confidence of the community.⁸

2.2 THE PARLIAMENTARY IMMUNITY AND/OR PRIVILEGES

It is difficult to talk about parliamentary freedom of speech without discussing about Parliamentary Immunity or Privileges. The reason is simple; in that without parliamentary immunity or privileges there cannot be freedom of speech. Members of Parliament will still be encumbered (limited) to talk freely for fear of being prosecuted for criminal offences or sued for civil liabilities.⁹

2.2.1 The Meaning of Parliamentary Immunity and/or Privileges

Parliamentary Immunity is a kind of legal protection or shield which is given

4 Primarily, these are the main functions of parliament in any democratic setting, see: May, *Treaties on the Law, Privileges, Proceedings and Usages of Parliament*, (16 ed), 1957.

5 See: generally the rationale for freedom of speech discussed in Chapter one, section 1.3 and specifically for parliament in Chapter four, concluding section.

6 For more detailed information, particularly on the historical development of the Constitution's freedom of speech and debate, see Yankwich, *The Immunity of Congressional Speech – Its Origin, Meaning and Scope*, 99 U. PA. L.REV. 960, 961-66 (1951); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK UL REV. 1, 3-16 (1968); Martin C McWilliams, Jr., *Constitutional Law Separation of Powers Speech or Debate Clause Prevents Judicial Review of Senate Subcommittee's Issuance of Subpoena Duces Tecum*, 46 MISS. LJ 1112, (1975).

7 See: Enid Campbell, *Commonwealth Powers and the Privileges of State Parliaments*, 20 U. QUEENSLAND LJ 201 1998-1999.

8 See: Enid Campbell, *Expulsion of Members of Parliament*, 21 U. TORONTO LJ 15 1971 at 25.

9 See: *Eastland v United States Servicemen's Fund* 421 US 491 (1975) at 502.

to the Parliament and its members to protect them from prosecution from civil and/or criminal offences.¹⁰ Most domestic laws which provide for this immunity contain words like these:

No Civil or Criminal Proceedings may be instituted against any member [of Parliament] for words spoken before, or written in a report to the Assembly proceedings or a committee, or by reason of any matter or thing brought by him therein by petition, bill, or motion or otherwise or for words spoken or act done in *bona fide* pursuance of a decision or proceeding of the Assembly or a committee.¹¹

In other words, parliamentary immunity can generally be defined as the sum of the peculiar rights enjoyed by parliament as an institution and by members of parliament individually, which exceed those possessed by other bodies or individuals, and without which they could not discharge their functions.¹² On the other hand, parliamentary privileges may be used synonymously to parliamentary immunity. The two phrases are always used together or alternatively to connote the same meaning. Nevertheless, the latter phrase carries with it an extensive meaning than the former.¹³ Parliamentary privilege is the term used to describe the laws relating to two main aspects:

- (i) The privileges or immunities of the Parliament; and
- (ii) The powers of the Parliament, particularly its power to hold inquiries and to punish contempt of Parliament.¹⁴

In this sense the term ‘privilege’ refers not to any special benefits or entitlements enjoyed by Members of Parliament individually and collectively, but to the immunity from ordinary law, that together with the potential exercise of parliamentary powers, enables the Houses of Parliament to carry out their primary functions of legislating, debating and inquiring more effectively and independently.¹⁵ Privilege in this restricted and special sense

10 See: USAID, *Parliamentary Immunity Brief: A Summary of Case Studies of Armenia, Ukraine and Guatemala*, August 2006 at 1. It can be accessed at http://www.gopacnetwork.org/Programming/programming_PI_en.htm (the author accessed it on 2 March 2008).

11 Section 5 of The Parliamentary Powers, Immunities and Privileges Act, 1988 of Tanzania.

12 Erskine May, *Parliamentary Practice*, (22 ed), 1977, at 65.

13 With due respect to the retired former Speaker of the Parliament of Tanzania, who is now the Vice Chairman of the ruling party, CCM, the two phrases have no “clear distinction” as he argues in his book – *Parliamentary Privilege in Tanzania: Parliamentary Civic Education Programme*, 2003 at 3. The two concepts only differ in the senses explained here in this work. That is to say while the word Parliamentary Immunity is narrow Parliamentary Privilege is wider to include the latter.

14 See: Tasmanian Parliamentary Library, *Parliamentary Privilege*, can be found at: http://www.parliament.tas.gov.au/tpl/InfoSheets/Parl_Priv.htm (accessed on 2 March 2008).

15 *Ibid*

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should not be confused with the privilege in the colloquial sense of a “special benefit, entitlement or arrangement.” It is not a “privilege” as opposed to a “right” in the ordinary usage of the words. Because, when you are talking of privilege one can arguably say that it can be taken away at pleasure. This is not the case with parliamentary privileges. One of the most important use of the privileges of parliament is the freedom of speech (which means to say what they feel), and freedom of debate (to discuss what they wish) in parliament which ought not to be impeached or questioned in any court or place out of parliament.¹⁶ This privilege cannot be taken away.

Parliamentary Immunity is therefore an immunity afforded to members of parliament which gives them freedom, as an individual, to be able, *inter alia*, to exercise full freedom of expression in their duties. It protects members of the parliament against legal liabilities for what they said or did in the course of debate. It must, therefore, be emphasized that parliamentary immunity is designed as a tool to ensure Members of Parliament are conferred with specific rights and privileges, most importantly *the freedom of speech*. The rationale for this, it has been said,¹⁷ is that freedom of expression is the working tool of members of parliament which enables them to do their job as representatives of the people, legislating, adopting the budget and overseeing the activities of the government. If they cannot speak out, criticize the government and investigate and denounce abuses because of fear of reprisal by the executive branch or other powerful actors, they cannot live up to their role. It is also crystal clear that, freedom of speech enables them to raise questions affecting the public good which might be difficult to voice elsewhere owing to the possibility of court action. They require immunity to freely express themselves without obstruction and without fear of prosecution or harassment of any kind.¹⁸

16 See: article 9 of the England’s Bill of Rights 1689 which forms the cornerstone of the Parliamentary Immunities and Privileges in all commonwealth countries. Further details on the history of article 9 see GF Lock, *The 1689 Bill of Rights*, (1989), 37 Political Studies 540 and Griffith, *Parliamentary Privilege: Use, Misuse and Proposals for Reform* (NSW Parliamentary Library, Sydney, Briefing Paper 4/97), at 12–14.

17 UNDP, *Parliamentary Immunity*, Background Paper prepared by the Inter-Parliamentary Union, UNDP Initiative on Parliaments, *Crisis Prevention and Recovery* In Association with the Inter-Parliamentary Union, September 2006. The paper can be accessed at <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf> (accessed on 1 March 2008).

18 *Ibid* at 2.

Parliamentary privilege, as we have stated above, goes further than parliamentary immunity. It refers to two significant aspects of the law relating to parliament: First, the privileges or immunities of the Houses of the Parliament (which is what is called parliamentary immunity), and second, the powers of the houses to protect the integrity of their processes, particularly the power to punish contempt. In this respect parliamentary privilege also touches upon the corporate privileges of parliament which carries with it the two main powers of the Houses to: (i) conduct inquiries and (ii) punish contempts.¹⁹ We should expand these two powers of parliament which are the cornerstone to any democratically elected parliament.

2.2.1.1 *Power of Parliament to Conduct Inquiries*

As referenced earlier the major functions of any parliament is to legislate and overseeing the activities of the government. We can refer the latter role as 'supervising the supervisors' since the executive government is the one which carries on (supervises) the day-to-day activities of the state. In order to do so effectively, informed debate and scrutiny of the activities of the executive government must take place.²⁰ To these ends parliament is empowered to make the necessary inquiries to procure the information it requires. Parliamentary Houses have the power to require the attendance of persons and the production of documents and to take evidence under oath.²¹ This power is underpinned by the potential to punish for contempts, by which the houses may enforce the attendance of witnesses, the answering of questions and the production of documents.²²

Most parliamentary houses do not exercise the power to conduct inquiries themselves. Usually this power is delegated to committees²³ by giving those committees the powers to require the attendance of witnesses and the production of documents. For instance, in Tanzania, the Parliamentary Immunities, Powers and Privileges Act, 1988²⁴ section 13 states that:

13(l) The Assembly, any standing committee or any sessional committee may,

19 See: Parliament of Australia, *SENATE, Parliamentary Privileges*, Senate Brief number 11, September 2006, found at <http://www.aph.gov.au/Senate/pubs/briefs/brief11.htm> (accessed on 1 March 2008).

20 See: Tasmania Parliamentary Library, *supra* note 14.

21 Parliament of Australia, *SENATE*, *supra* note 19 at 2.

22 *Ibid*

23 See: Martin C McWilliams, Jr., *Constitutional Law Separation of Powers Speech or Debate Clause Prevents Judicial Review of Senate Subcommittee's Issuance of Subpoena Duces Tecum*, 46 MISS. LJ 1112 (1975) at 1115.

24 Act number 3 of 1988. You can access this Act or any other Tanzanian statute by visiting the Parliament Website at: <http://www.parliament.go.tz/bunge/bunge.asp>.

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subject to provisions of section 18 and section 20 of this Act, order any person to attend before the Assembly or before such committee and to give evidence or to produce any document in the possession or under the control of such person.

- (2) The powers conferred by subsection (1) of this section on a sessional committee may be exercised by any other committee which is specially authorized by a resolution of the Assembly to exercise such powers in respect of any matter or question specified in the resolution.

The same is true in the US, UK, and Australia, etc. The parliament can delegate its duties to its committees. In the US, for example, many issues concerning the US Government are initiated by the executive branch.²⁵ The legislative branch checks and scrutinizes the work done by the executive branch. Though both the Senate and the House of Representatives have responsibilities to do this (exercising oversight function) it is the Senate that has particular responsibilities in this area since the Senate has the power to ratify presidential appointments, treaties and sanctions many activities of the government.²⁶ To relieve the Congress of the duty to investigate all activities of the executive branch, most of the investigative work of Congress²⁷ is done through its committee system.²⁸

The Parliamentary Privileges Act, 1987 of Australia, which also closely follows an English system²⁹ of Parliament,³⁰ contains similar provisions. The

25 See: *McGrain v Daugherty*, 273 US 125, 175 (1927), *Gavel v United States*, 408 US 606, 617 (1973).

26 For more detailed information, please visit, <http://www.historylearningsite.co.uk/congress-america.htm> (accessed 1 March 2008).

27 The word Congress is used to refer to the two Houses, the Senate and House of Representatives.

28 See: *supra* note 26.

29 Under the British system the Parliament of the United Kingdom of Great Britain and Northern Ireland is the supreme legislative body in the United Kingdom and British overseas territories. It alone has parliamentary sovereignty, conferring its ultimate power over all other political bodies in the UK and its territories. At its head is the Sovereign, Queen Elizabeth II. The parliament is bicameral, with an upper house, the House of Lords, and a lower house, the House of Commons. The Queen is the third component of Parliament. The House of Lords includes two different types of members: the Lords Spiritual (the senior bishops of the Church of England) and the Lords Temporal (members of the Peerage); its members are not elected by the population at large but are appointed by past or current governments. The House of Commons is a democratically elected chamber with elections to it held at least every 5 years. The two Houses meet in separate chambers in the Palace of Westminster (commonly known as the "Houses of Parliament"), in the City of Westminster in London. By constitutional convention, all government ministers, including the Prime Minister, are members of the House of Commons or, less often, the House of Lords, and are thereby accountable to the respective branches of the legislature. In theory, supreme legislative power is vested in the Queen-in-Parliament; in practice in modern times, real power is vested in

powers to conduct inquiries can be delegated to committees, and proceedings in parliamentary committees are proceedings in parliament, and the immunity from impeachment or question in the courts attaches to words uttered in committee proceedings by members and witnesses and to the production of documents to committees.³¹ The powers with which the Houses of Australia's Federal Parliament are endowed by the force of section 49 of the Federal Constitution include a power to initiate inquiries by their Members armed with a range of coercive powers.³² The Houses have power to command the attendance of persons before them to give evidence and to produce documents. They also have power to order the arrest of persons who defy such commands and to have brought them, by force, before the House.³³ The investigatory powers include power to require that evidence be given under oath or affirmation.³⁴ Those who act in disobedience of a House's commands in these respects may be penalized³⁵ by the Houses.³⁶ These powers, given to Parliamentary Houses, enable them to discharge their functions effectively.

2.2.1.2 *Power of Parliament to Punish Contempt*

In many jurisdictions governed by a parliament, contempt of Parliament is the crime of obstructing the parliament in the carrying out of its functions, or of hindering any member of parliament in the performance of his or her duties.³⁷ Actions which can constitute contempt of parliament may vary from one jurisdiction to another, but ordinarily, the typical acts include:

the House of Commons; the Sovereign generally acts on the advice of the Prime Minister and the powers of the House of Lords are limited. Please visit http://www.parliament.uk/about/index_page.cfm

30 Australia unlike Tanzania has bicameral legislature, in the sense that it has two Houses, namely, the Senate which is the upper of the two houses of the Parliament of Australia. The lower house is known as the House of Representatives. Senators, popularly elected under a system of proportional representation, serve terms of six years. Significant power is conferred upon the Senate by the Australian Constitution, including the capacity to block legislation initiated by the government in the House of Representatives, making it a distinctive hybrid of British Westminster bicameralism and an American separation of powers. Visit <http://www.aph.gov.au/Parl.htm>.

31 See: Parliament of Australia, SENATE *supra* note 19 at 2.

32 See: the Department of Parliamentary Library, Information and Research Services, *Parliamentary Privileges*, Research Paper number 1 2000-0. Available at <http://www.aph.gov.au/library/pubs/rp/2000-01/01RP01.pdf> (accessed 1 March 2008).

33 Under the Tanzanian *Parliamentary Immunities, Powers and Privileges Act, 1988* this power of summon and arrest is contained in sections 14 and 15.

34 See also *Ibid* section 16.

35 See also *Ibid* sections 21, 23, 24, 30, and 31.

36 Enid Campbell, *Parliamentary Privilege in Australia* Melbourne University Press, 1966., Chapter 10. Also quoted in Australia, *Parliamentary Privileges*, *supra* note 19 at 16.

37 See <http://www.theyworkforyou.com/glossary/?gl=95>.

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- (i) Deliberately misleading a House of Parliament or a parliamentary committee.³⁸
- (ii) Refusing to testify before, or to produce documents to, a House or committee.³⁹
- (iii) Attempting to influence a Member of Parliament⁴⁰, for example, by bribery or threats.⁴¹
- (iv) Showing disrespect in speech to the Speaker or the Parliament or in any other way unlawful causing disturbance or obstructing the activities of the Parliament.⁴²

In some jurisdictions, a House of Parliament may declare any act to constitute contempt and to punish such an act, even when there is no precedent for such an act being so judged and punished.⁴³ This power to deal with contempt is the exact equivalent of the power of the courts to punish contempt of court.⁴⁴ In others, like Tanzania, contempt of Parliament is defined by statute, except in very rare situations⁴⁵ where the Parliament can define and declare an act to constitute contempt. However, such declaration is restricted in so far as it is reasonably necessary for the discharge of the functions assigned to the Parliament by the Constitution. And, while Parliament makes the initial decision of whether to punish for contempt, the person or organization in contempt of Parliament is not punished by the Parliament, rather the Parliament, through the Speaker, request the Attorney General to take steps necessary to bring to trial before a court of competent jurisdiction any person

38 See, for example, sections 21, 22 and 23 of the Tanzanian Act number 3 of 1988.

39 *Ibid* Section 31.

40 *Ibid* Section 28.

41 See: *supra* note 36.

42 See: sections 24, 29, 30 of the Tanzanian Act, number 3 of 1988.

43 See: Parliament of Australia, SENATE, *supra* note 19 at 3.

44 Probably with the use of a more recent law, the Parliamentary Privileges Act, 1987, in Australia will limit on the power of the houses to punish contempt unlike in the previous law. Section 4 of the Act defines an act of contempt as: "Conduct (including the use of words) ... [which] amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

45 It is argued in very rare situations because all offences against Parliament are proscribed in the Act. Nevertheless, the Act says that "12.(1) It is declared for the avoidance of doubt that subject to the Constitution and the Standing Orders of the Assembly, the Assembly has all such powers and jurisdiction as may be necessary for inquiring into, judging and pronouncing upon the commission of any act, matter or thing, not amounting to an offence under this Act, which is a breach of Parliamentary privileges. [Emphasis mine]

connected with the commission of an offence against the Parliament.⁴⁶

It is the author's view that, this approach is more progressive, for the reasons that it tries to respect the principle of separation of powers and the principles of natural justice. The Parliament of Tanzania does not want to avail itself the function of determining whether a person is, or is not guilty, which traditionally is vested in the courts of law through the concept of separation of powers. Likewise, the Parliament tries to avoid being a judge of his own cause by determining for itself that an accused person has committed contempt against the Parliament. Since proceedings to determine whether an offence against the Parliament or its Committee has occurred are essentially judicial in character, it is important that the proceedings be conducted in accordance with the principles of natural justice. This too is in accord with Article 14 of the ICCPR which provides that in the determination of criminal charges, "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The rationale of maintaining the concept of contempt of the Parliament is that the Parliament should be able to protect itself from acts which directly or indirectly impede it in the performance of its functions.⁴⁷

2.3 THE LEGAL BASIS FOR PARLIAMENTARY IMMUNITY

We have seen that the underlying reason for having immunity is to make sure that members of parliament debate and pass resolutions freely on subjects of its own choosing. This is the cornerstone of parliamentary democracy. This is made possible by ensuring that members of the house have the right to say what they will (freedom of speech) and discuss what they will (freedom of debate). Historically, these freedoms, the single most important parliamentary privilege, were first enshrined in the English Bill of Rights, 1689.⁴⁸ This Act was a culmination of the long struggle between the House of Commons and the Crown. The vindication by parliament of the freedom of speech generally traced back to the year 1396 of 1997, when the entire legislature the House of Commons, the House of Lords and the King- agreed that a judgment sentencing a person to death for treason, on account of his having presented a bill to parliament for the purpose of reducing the excessive charge of the Royal Household, was in derogation of the privileges of parliament and was to be "annulled - and no force and effect."⁴⁹ Following the Glorious

46 Section 12(3) of Tanzania Act.

47 Parliament of Australia, SENATE, *supra* note 19 at 3.

48 See: UNDP, *Parliamentary Immunity*, *supra* note 17 at 4.

49 *Ibid.*

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Revolution and the adoption of the Bill of Rights, 1689, the powers of the Crown were reduced tremendously. To use the modern spelling, Article 9 of the Bill of Rights states that “the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”⁵⁰

In many countries these freedoms of speech and debate are guaranteed by the Constitution or an Act of Parliament or both.⁵¹ In the US this freedom is provided in the Constitution – “for any speech or debate in either House, [members of the Senate or the House of Representatives] shall not be questioned in any other place.”⁵² However, the extent to which the freedom of speech is protected differs from one jurisdiction to another. In some countries the scope of protection of the freedom of speech is very wide to include not only the freedom during parliamentary proceedings but also outside the parliament.⁵³ These are countries which were mostly influenced by France.⁵⁴ The French Revolution and the passing of the French Declaration of the Rights of Man and the Citizen, 1789, made special measures which were deemed necessary to ensure independence of the members of the National Assembly, and in particular their freedom of expression, their right to liberty and their freedom of movement.⁵⁵

Marc van der Hulst notes that, in France since in the context of the Revolution the National Assembly has assumed a position of superiority over the other State organs, it could go further than its British counterpart.⁵⁶ When, on 25 June 1789, the King ordered the members of the Estates General to leave the building where they were meeting, the National Assembly adopted a motion in which it declared the person of each deputy (i.e. a member of parliament) inviolable and further proclaimed that every individual, corporation, tribunal or commission venturing to prosecute, arrest, or attempt

50 Quoted from, the United Kingdom Parliament, *Parliamentary Privilege First Report*, Chapter 2. Available at: <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4306.htm> (accessed 4 March 2008).

51 See: Robert Myttenaere, *The Immunities of Members of Parliament*, *supra* note 2. Myttenaere presented a report in the Inter Parliamentary Union in September 1998, Moscow Session, explaining the practice in almost all countries of the World.

52 US CONST. art, 1, section 6, clause 1.

53 Robert Myttenaere *supra* note 2.

54 *Ibid.*

55 *Ibid.*

56 Marc Van Der Hulst, *the Parliamentary Mandate, a Global Comparative Study*, IPU 2000, at 65.

to arrest and detain a deputy during or after the session on account of proposals, statements or opinions given at the Estate General were traitors to the Nation, and were committing a capital crime.⁵⁷

It is argued that this novel French concept of 'Parliamentary Inviolability' was analyzed as a measure of public order seeking to shelter the legislative power from encroachments by the executive and not as a privilege created for advantage of a single category of individuals.⁵⁸ According to Robert Myttenaere,⁵⁹ an evolution has taken place in France jurisprudence. Two theses existed side by side with regard to parliamentary privilege. The first thesis, the broad thesis, every political action of a member of parliament was considered as carried out in the exercise of his parliamentary mandate. According to the second thesis, narrower in scope, only those actions which are necessary to the accomplishment of the parliamentary mandate are covered by parliamentary privilege. This second thesis now holds water since it was confirmed in 1989 by the decision of the Constitutional Council.⁶⁰ Although broader in scope contrasted to the English model, it is more reasonable in the prevailing world of democracy and equality before the law.⁶¹

57 UNDP, *Parliamentary Immunity*, *supra* note 17 at 4.

58 Hélène Ponceau, *Parliamentary Privileges and Immunities*, Association of Secretaries General of Parliament, 113th Assembly of the Inter-Parliamentary Union, October, 2005.

59 *Supra* note 2.

60 The Constitutional Council (*Conseil Constitutionnel*) was established by the Constitution of the Fifth Republic on 4 October 1958. It is the highest constitutional authority in France. Its duty is to ensure that the principles and rules of the Constitution are upheld. It considers conformity with the Constitution, and, since 1971, conformity with two texts referred to by the preamble of that Constitution: the Declaration of the Rights of the Man and of the Citizen and the preamble of the Constitution of the Fourth Republic, which are considered to be general principles of constitutional law. The Council can only do so when issues are brought before it, it has no power to judge otherwise. Thus statute legislation can only be judged to be unconstitutional if it is brought before the Council before it is signed, after it is passed by Parliament: it is not possible to bring legislation to the Council afterward. Please visit, <http://www.britannica.com/eb/topic-134289/Constitutional-Council>.

61 It is not the scope of this work to deal in detail with the issue of comparative analysis of the two models - the English and French models. More explanation can be obtained by reading UNDP, *Parliamentary Immunity*; *supra* note 123 and Robert Myttenaere, *The Immunities of Members of Parliament*, *supra* note 2.

CHAPTER THREE

THE LEGAL FRAMEWORK AND PRACTICE OF THE FREEDOM OF SPEECH FOR MPS IN TANZANIA

3.1 THE LEGAL FRAMEWORK OF FREEDOM OF EXPRESSION IN GENERAL

Freedom of expression, in general, like many other human rights norms was not a right which was guaranteed by the Constitution of Tanzania for over two decades since the country's independence in 1961. It was until 1984 that the current Constitution of the United Republic of Tanzania of 1977¹ (hereinafter the "URT Constitution" or the "Constitution") was amended to include what is referred by many people in Tanzania, particularly the academic circles,² as the Bill of Rights.³ Among the rights contained in the Bill of Rights as enshrined in the Constitution is the freedom of expression. Article 18(1) of the Constitution, when was enacted for the first time, unfortunately, began with claw-back clause,⁴ but has now been changed⁵ since 2005 to read as follows:

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- 1 Before the present Constitution Tanzania had four other Constitutions, namely, the Independence Constitution of 1961, which was replaced by the Republican Constitution of 1962, then modified in 1964 to accommodate the Union in 1964 and thereafter the Interim Constitution of 1965.
 - 2 See: for example, Professor Chris Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials*, 1997; William Binchy and Catherine Finnegan (Ed.) *Human Rights, Constitutionalism and the Judiciary: Tanzania and Irish Perspectives*, Clarus Press; Robert Makaramba, *A New Constitutional Order for Tanzania? Why and How*, Tanganyika Law Society.
 - 3 The Constitution of URT contains both the *Bill of Rights* (named as Basic rights) and the Duties/Obligations of Individual persons. The *Bill of Rights* runs from article 12 to article 24; and the Duties of individual to Society start from article 25 to 28. But problematic are some provisions under the title 'General Provisions', particularly article 30 which contains a general limitation clause which if not used wisely can derogate the rights contained in the same Constitution.
 - 4 For discussion on Claw-Back Clauses read a paper by Makau Mutua, *The African Human Rights System: A Critical Evaluation*, from page 6. Available at <http://hdr.undp.org/en/reports/global/hdr2000/papers/mutua.pdf> (accessed 4 March 2008).
 - 5 See: section 5 of the Fourteenth Constitutional Amendments of the Constitution of the United Republic of Tanzania, 1995 (Act number 1 of 2005).

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18. Every person:

- (a) has the right to freedom of opinion and expression;
- (b) has the right to seek, receive and impart information regardless of the national frontiers;
- (c) has the right to freedom of correspondence without interference;
- (d) has the right to be informed any time of various important events concerning lives and citizen activities as well as issues of importance to the society. (My own translation from the URT Constitution which is written in Swahili).⁶

The way in which the right to freedom of expression and information appears in Article 18 above suggests that this right is absolutely given, as the article does not contain what is called limitation clause. However, this is not the case. As said earlier, there is a general limitation clause in Article 30 of the Constitution. It is important to cite it *in extenso* in order to shade light not only to the limitations of the rights of expression but also with regard to all other rights and freedom contained in the URT Constitution. The article reads as follows:

- 30(1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by an individual person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.
- (2) the provision contained in this Part of this Constitution, which set out the basic human rights, freedoms and duties, do not invalidate any existing legislation or prohibit the enactment of any legislation or the doing of any lawful act in accordance with such legislation for the purpose of:
 - (a) ensuring that the rights and freedoms of other people or the interests of public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals;
 - (b) ensuring the defense, public safety, public order, public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property or any other interests for the purposes of enhancing the public benefit;
 - (c) ensuring the execution of a judgment or order of a court given or

6 The Court of Appeal of Tanzania in *DPP v Daudi Pete* [1991] 2 LRC (Const) 553 held that the Swahili Constitutional version is controlling one and not the English version.

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made in any civil or criminal matter;

- (d) protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings, prohibiting the disclosure of confidential information, or safeguarding the dignity, authority and independence of the courts;
- (e) imposing restrictions, supervising and controlling the formation, management and activities of private societies and organizations in the country; or
- (f) enabling any other thing to be done which promotes, or preserves the national interest in general.⁷

The practical effect of these limitations is to narrow down all the rights and freedoms provided for in the Constitution. While we can all agree that not all rights and freedoms are supposed to be absolute,⁸ a so wide, cobweb-like, provision like this one can not augur well with the objective and duties of the state to promote, protect, respect and fulfill the human rights norms. If the limitations contained therein (in Article 30) are not strictly and narrowly interpreted the rights and freedoms guaranteed in the *Bill of Rights* will be reduced into an empty shell.⁹ It is therefore very important for the courts when interpreting and applying a statute which contains limitations to the rights and freedoms, to ensure that they are guided by the tests applied by the International Human Rights bodies as discussed in Chapter One above.¹⁰ Briefly, the tests are as follows: (i) The state must offer a proof showing that the limitation/restriction is provided for by the law; (ii) That, such limitation/restriction has a legitimate purpose, such as for the protection of national security, public safety, public morality, etc; and (iii) That, such limitation/restriction is reasonably necessary in a democratic society.

7 This Article is taken almost verbatim from the English version of the Constitution of the United Republic of Tanzania, 1977 as printed by the Attorney General Office in 1998 since the author believes that it comports almost exactly to the Swahili version.

8 See: this argument in Chapter one *supra* from page 3.

9 See: similar observation by Palamagamba John Kabudi, *The State of Human Rights in Tanzania: The Challenges in the Twenty First Century*, at 10. A paper presented to a Seminar on Human Rights, University of Dar es Salaam, 7-9 February 2002.

10 See: Chapter one *supra* from page 13.

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3.1.1 The Era of One-Party State and Party Supremacy in Tanzania

Although the freedom of speech and debate for Members of Parliament in Tanzania existed in theory before the Bill of Rights,¹¹ we can strongly argue that the current wave of strong Parliament¹² traces its roots from the Bill of Rights, other constitutional amendments,¹³ and the enactment of the Parliamentary Immunities, Powers and Privileges Act, 1988. Before this time, and particularly before the multiparty politics were re-introduced in Tanzania in 1992 the country was predominantly under the dictate of the only and powerful party, TANU¹⁴ and later CCM. During this era politics were above everything in the country. This means that all activities and institutions of the State were placed under the control of the party.¹⁵ This period is characterized as the “Party Supremacy” era.¹⁶ Even the Parliament was reduced to become a rubberstamp of the decisions and/or resolutions passed by the committees or other organs of the party. Any attempt by its members to assert their supremacy was rebuked by the executive government, and strong measures were taken by the party against those Members of Parliament who were very vocal. Few examples can drive the point home.

A few years after independence, and just two years after the creation of a single party system,¹⁷ a group of Members of Parliament (MPs) led a bitter

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- 11 There was a law called *Legislative Council (Powers and Privileges) Ordinance*, Chapter 359 which gave lip service to parliamentary freedom of speech and debate.
 - 12 See: the Introduction to this work, particularly footnote 2 *supra* in which the Parliament did a good job.
 - 13 Since the introduction of the *Bill of Rights* in the Constitution in 1984 through the Fifth Constitutional Amendments, many other Constitutional Amendments have followed suit. Until 2005 there followed in total of ten other Constitutional Amendments, including the 1992 amendments which brought in the country multiparty politics after twenty seven years of *de jure* one party rule.
 - 14 TANU means Tanganyika African National Union. This was the only party in Tanzania Mainland until 1977. In Zanzibar, the only single party was Afro-Shirazi Party (ASP). The two parties united in 1977 to form *Chama Cha Mapinduzi* (CCM).
 - 15 For more elaboration on this situation read Chris Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials*, 1997, Chapter One.
 - 16 In fact in 1975 the *de facto* party supremacy was formally enshrined in the *Interim Constitution of Tanzania* through Act number 8 of 1975. See: William Binchy and Catherine Finnegan (Ed.) *Human Rights, Constitutionalism and the Judiciary: Tanzania and Irish Perspectives*, Clarus Press, at 3–19.
 - 17 The idea of having single party system started since 1962 when the country became a Republic. In 1963 the TANU National Conference debated about having one party for the whole country (by then, Tanganyika). In the same year the National Executive Committee (NEC) of TANU met and made a decision to turn Tanganyika into a one-party State. Finally in 1965 the Constitution was

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attack against the Government when they wanted the Government to recognize that the Parliament was supreme and not the Party. For instance, in the Budget Session of June/July 1967, the then Member of Parliament for Musoma North Constituency, Honourable Paul Ndobho, called upon the Government to clear the doubt over supremacy issue between the Party and the National Assembly (i.e. Parliament),¹⁸ and whether the Government should be accountable to the Party or the Parliament.¹⁹ Likewise, in the debate on the Interim Constitution of Tanzania (Amendment) Bill, the Member of Parliament for Iringa South, the late Honourable Modest Chogga proposed that the Constitution should be amended to make the Parliament adviser to the President of the United Republic of Tanzania and, matters discussed by other organs in the country such as TANU or the Cabinet should ultimately be submitted to the Parliament for final approval or other actions.²⁰ The then Second Vice-President, Honourable Rashidi Kawawa, responding to these demands answered sharply that the Party was supreme and not the Parliament.²¹ The recommendations of the Members of Parliament suggesting that the Government be made accountable to the Parliament were played down.

The MPs were not halted. In the following year, 1968, the Government presented a Bill for the increase of the number of constituency members from 107 to 120. During the debate two MPs, Honourable FL Masha and Honourable Wilfred Mwakitwange made their contribution to the effect that since the post Arusha-Declaration,²² the role and the status of the Parliament was confused and needed clarification by the Government before additional expenses were incurred in enlarging the Parliament by increasing its members. The Government answer was very disturbing. The then Parliamentary

amended to introduce a *de jure* single-party system.

- 18 In Tanzania the words 'National Assembly' and 'Parliament' are sometimes used interchangeably because in Swahili there is only one word '*Bunge*'. However, in the strict sense the word 'National Assembly' should be restricted to the composition of only Members of Parliament excluding the President. The reason is that the word 'Parliament' means two parts, the National Assembly and the President. See: article 62(1) of the URT Constitution. In this arrangement the Bill passed by the National Assembly cannot become a law until it is assented to by the President (See article 97). This work uses both words interchangeably to mean the parliamentary House.
- 19 The Parliamentary Debates (*Hansard*) of July 1967. See: particularly Cols: 2533-4 between 18-22 July 1967.
- 20 Chris Maina Peter, *supra* note 15 at 7.
- 21 Pius Msekwa, *Towards Party Supremacy, Arusha*, 1977 at 41.
- 22 Arusha Declaration was blueprint passed by TANU in 1967 to declare the policy of *Ujamaa na Kujitegemea* (Socialism and Self Reliance) and other related matters necessary to the achievement of Socialism in the country under the leadership of the Father of Nation, the late Mwalimu Julius Kambarage Nyerere.

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Secretary in the Office of the Second Vice-President, the Honourable late Richard Wambura, warned as follows:

Mr Speaker, I wanted to make it clear that it is the Party which is supreme and all the MPs are expected to work under the leadership and guidance of the party. The party picked you MPs in nomination and the party has the right to discipline you and dictate your tasks. It is high time that the MPs should know where they come from, and it is beyond any doubt that this Parliament belongs to TANU.²³

Chris Maina Peter says that the Parliament got divided because of this tension. He remarks, “For the opportunist characters in the House the time to capitulate had arrived. To save their skins, they chose the side of the stronger and deserted the struggle for democracy.”²⁴ Some of the MPs turned hostile against their fellow MPs and sided with the Government. Probably, they conceded squarely with an adage which goes that ‘if you cannot fight your enemy [the stronger] join him’. For example, one MP, Honourable Ali Migeyo, called upon the Party to wipe out counter-revolutionary elements.²⁵ To add salt to the wound, in October 1968 the National Executive Committee (NEC) of the Party, which was meeting in Tanga decided to expel from the Party seven MPs, including those who led the contention against Party supremacy, who were alleged to have “grossly violated the Party creed both in their attitude and actions and for showing a very clear opposition to the Party and its policies.”²⁶ The expulsion led to automatic loss of their parliamentary seats because Party membership was one of the essential qualifications for membership in Parliament.²⁷

From the discussion and examples above it is evident that the concept of parliamentary freedom of speech and debate was missing in Tanzania for a significant period of time. The Party and the Executive branch wielded all the State powers and reduced the Parliament as a platform to rubber-stamp decisions already and finally made by the Party or the Executive branch.²⁸

23 Parliamentary Debates (Hansard) 1 October 1968, Col. 23.

24 Chris Maina Peter, *supra* note 15 at 7.

25 *Ibid* Quoting the *Nationalist Newspaper* (Tanzania) of 2 October 1968.

26 Pius Msekwa, *Towards Party Supremacy*, *supra* note 21.

27 Jwani T Mwaikusa, “*Tanzania’s Constitutional History and Development*,” in William Binchy and Catherine Finnegan, *Human Rights, Constitutionalism and the Judiciary*, *supra* note 16 at 8.

28 In fact the Executive branch which included the President, Vice Presidents, and Ministers were also the ones who were in the leadership position in the party. So, the actions of the executive were also the actions and policy of the party and vice versa.

3.1.2 The Legal Framework of Parliamentary Freedom of Speech and Debate Today

Thanks to the constitutional and legal reforms made since 1984 to usher in the country a new chapter not only as far as human rights situation is concerned but as well as a resurgence of more parliamentary freedom of speech and debate. It is the view of this work that since its landmark decision in February this year [2008] to approve the findings of its Select Committee chaired by Honourable Dr Harrison Mwakyembe, which investigated the Richmond scandal, followed by the resignation of the Prime Minister and two other Ministers, the Parliament has started to gain ground which it had lost.²⁹ Now, Tanzanians are witnessing a new era in the Parliament, where members are able to speak and defend the interests of their country regardless of whether they are from the opposition or ruling party.³⁰ Although there are areas which still need improvements, as we shall see, the country has been able to surmount the deadlock which bedeviled her for over two decades. This new vigor and zeal definitely should not only be attributed to the law reform but as well as to the new Speaker, Honourable Samwel Sitta, who is a lawyer by profession. He has always proclaimed himself to be a Speaker of 'Standards and Speed'.

At least now, the parliamentary privileges of speech and debate are guaranteed under Article 100 of the URT Constitution. The article reads:³¹

- 100(1) there shall be freedom of opinion [speech], debate and procedure³² in the National Assembly, and that freedom shall not be impeached or questioned by any organ in the United Republic, or in any court or elsewhere outside the National Assembly.
- (2) subject to this Constitution or to the provisions of any other relevant law, no Member of the Parliament shall be prosecuted or sued in civil proceedings in court in relation to anything said or done by him in the National Assembly or brought by him in the National Assembly by petition, bill, motion or in any other way.³³

29 See: footnote 2 *supra* in Chapter 1. For more recent debates in the Parliament in Tanzania see its Hansard from Parliament website <http://www.parliament.go.tz/bunge.asp>

30 *Ibid*

31 The article is translated from Swahili to English.

32 For the discussion of procedure see: section 3.2 hereunder in this Chapter.

33 I am grateful to the two main sources which I used to translate the Swahili version. First, the English version of the Constitution itself which is not authentic, and secondly, Robert Makaramba's work, *A New Constitutional Order for Tanzania? Why and How*, Tanganyika Law Society, at 21. I used these two sources since each of them, according to my view, does not

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Ancillary to that, there is Article 101 which empowers the Parliament to enact legislation to regulate the Parliamentary freedoms of opinion, debate and procedure. It declares that:

101. Parliament may enact a law making provisions to enable the court and the law to preserve and enforce the freedom of opinion [speech], debate and procedure of Parliamentary business which in terms of Article 100 is guaranteed by this Constitution.

In obedience to these constitutional mandate, in 1988 the Parliamentary Immunities, Powers and Privileges Act (hereinafter the “Act”) was enacted by the Parliament. This Act restates the constitutional guarantee as well defining the privileges, immunities and powers of the Parliament and its members. The detailed provisions of this law are explained by the former Speaker of the Parliament, Honourable Pius Msekwa, in his work³⁴ – which shades light to many issues. This work does not intend to repeat what is contained in Msekwa’s work; rather it takes issue with a controversial question of parliamentary freedom of speech and debate in Tanzania and tries to draw best lessons from other countries through analytical discussion. Suffice, therefore, to observe that the Act provides and defines the following privileges and powers of the Parliament and its members. We begin with the privileges and then the powers by just mentioning them without providing an elaborate discussion for the reason explained above.

- (i) The freedom of speech and debate in the House³⁵

The freedom of members to hold meetings in constituencies subject to the law.³⁶

The immunity from civil or criminal proceedings against any member for words spoken or written, act done or thing brought by him by petition, bill or motion in the House³⁷ or a Committee of the Parliament.³⁸

The immunity or freedom from arrest for any civil debts except for a debt

provide a correct translation of Swahili version of the Constitution – the authentic version.

34 Pius Msekwa, *Parliamentary Privilege in Tanzania*; Parliamentary Education Programme, 2003.

35 Section 3 of the *Parliamentary Immunities, Powers and Privileges Act, 1988*.

36 *Ibid* Section 4.

37 The words, ‘House’, ‘Assembly’, and ‘Parliament’ are used here interchangeably to mean the same thing.

38 *Ibid* Section 5.

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the contraction of which constitutes a criminal offence.³⁹

The immunity from service or execution of civil process within the precincts of the Parliament while the Assembly is sitting.⁴⁰

The privilege of not being required to give evidence elsewhere respecting the contents of any document or minutes laid before the Assembly or proceedings or examination held before the Assembly or Committee, without the leave of the Assembly or the Speaker.⁴¹

The right to request and be furnished with any information from the public officer concerned subject to the laws regulating the disclosure of information by public officers.⁴²

The immunity of the Speaker and any officer of the Parliament⁴³ from being subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officers by the Act.⁴⁴

The powers of the Parliament as provided by the Act are the following:

- (1) The power of the Speaker to issue orders to regulate the admittance and the conduct of strangers (non-members), within the precincts of the Parliament.⁴⁵
- (2) The powers and jurisdiction to inquire into, judging and pronouncing upon the commission of any matter or thing which is a breach of Parliamentary privileges (contempt of parliament), subject to the Constitution and Standing Orders of the Assembly,⁴⁶
- (3) The power to order any person to attend before the Assembly or before its committee, and to give evidence or produce any document in his possession or under his control,⁴⁷ and if the said person avoids services of summons or refuses to obey the summons the Speaker may issue a warrant to arrest that person.⁴⁸

39 *Ibid* Section 6.

40 *Ibid* Section 11.

41 *Ibid* Section 9.

42 *Ibid* Section 10.

43 The Act defines 'officer of the Assembly' as the clerk or any other officer or person acting within the precincts of the Assembly under the orders of the Speaker and includes any police officer on duty within the precinct of the Assembly.

44 Section 35 of the Act.

45 *Ibid* Sections 7 and 8.

46 *Ibid* Sections 12, 29, 30, 31.

47 In this aspect read together sections 13, 14, 15, 16, 17, 18, 20, 21, 23, 24 and 25 since this power is subject to certain restrictions and privileges of the witnesses.

48 *Ibid* Section 15.

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- (4) The power of the Assembly or its authorized committee to require that any facts, matters or things relating to the subject matter of inquiry before the Assembly or such committee be verified or otherwise ascertained by the oral examination of witnesses, and may cause such witnesses to be examined under oath.⁴⁹
- (5) The power to regulate the internal affairs of the House, and the power to enforce discipline on its members.⁵⁰

The last powers are not stated in the Act. Since they are the critical concern under this work the next part will dwell with them in a more elaborate way.

3.2 THE POWERS OF THE PARLIAMENT TO REGULATE ITS INTERNAL AFFAIRS, INCLUDING SPEECH, AND TO ENFORCE DISCIPLINE ON ITS MEMBERS

3.2.1 Power to Regulate Its Internal Affairs through Standing Orders

It is a common phenomenon for Parliamentary Houses to regulate their own affairs. In almost all states each Parliamentary House has the right to provide for its proper constitution.⁵¹ This power reflects the functional autonomy of the Parliament,⁵² and is grounded on the principle of separation of powers. Michel Couderc gives a viewpoint regarding the autonomy of parliament in the following manner:⁵³

Autonomy is not therefore an “empty shell” but a concrete reality which expresses in some way and to various degrees depending on the country, the shared specificity of the parliamentary phenomenon throughout the world. This is not

49 *Ibid* Section 16.

50 See: Pius Msekwa, Parliamentary Privilege, *supra* note 34 at 18 -21.

51 See: The United Kingdom *Parliament, Parliamentary Privilege First Report*, *supra* note 50 of Chapter 2.

52 In the United Kingdom this autonomy is also attributable to the concept of Parliamentary sovereignty. This is a concept in constitutional law that applies to some parliamentary democracies. Under this mode a legislative body has absolute sovereignty, meaning that it is supreme to all other government institutions, including the executive or judicial bodies. Furthermore, it implies that the legislative body may change or repeal any prior legislation. (The power to make and unmake any law). This principle is sharply contrasted with the notion of Constitutional Supremacy where the Courts, in the exercise of their judicial review, may overturn any legislation deemed unconstitutional. Specific instances of parliamentary sovereignty exist in the UK Israel and New Zealand.

53 Michel Couderc, *A Report on the Administrative and Financial Autonomy of Parliamentary Assemblies*, adopted at Moscow Session in September 1998. Available at <http://www.ipu.org/ASGP-e/Couderc.pdf> (accessed 5 March 2008).

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surprising since autonomy is defined in effect by, on the one hand non dependence and non-subordination of Assemblies in relation to the Executive, and, on the other, by the possibility of the Assembly freeing itself at least partially from the rules of ordinary law so as to follow instead its own regulations.⁵⁴

This autonomy has a purpose: to allow a parliament freely to exercise the competence with which it is invested by the Constitution. It is thus a functional autonomy which manifests itself in the possibility of each house to determine its form of organization and its procedures, electing its own bodies, in particular its committees, being convoked by its speakers, and above all deciding on its own rules,⁵⁵ including self regulation on the freedom of speech to prevent abuse. It is quite common for a parliamentary house to have its own rules of procedures which may also contain powers of the Parliament to punish its members for misconduct.⁵⁶ In Tanzania the situation is similar to other countries. The Parliament is mandated by the Constitution to enact its own standing orders for the purpose of prescribing procedure for the conduct of its business. For the purpose of clarity it is important to quote verbatim the relevant provisions:

- 89(1) Subject to the provisions of this Constitution, the National Assembly may make Standing Orders for the purpose of prescribing procedure for the conduct of its business.
- (2) Standing Orders made pursuant to this article may prescribe procedure for the supervision of the discharge of the functions of the Secretariat of the National Assembly and also of the discharge of the business of the National Assembly in the National Assembly and those of its committees and sub-committees.

Unlike other powers this power of Parliament to regulate its processes is not detailed in the Parliamentary Immunities, Powers and Privileges Act, 1988. However, the Parliament of the United Republic of Tanzania has invoked the provisions of Article 89 above to establish its own Standing Orders called in Swahili *Kanuni za Kudumu za Bunge*. At present the Parliament is using the National Assembly Standing Orders, (2007 ed) (hereinafter the “Standing Orders” or “SO”). However, before this year the Parliament was using the (2004 ed). Since this work touches incidents which happened when the (2004 ed) was in use, we shall be guided by it, but later on we shall continue to

54 *Ibid* at 1.

55 *Ibid* at 2.

56 The US Constitution for example, under article 1, section 5, clause 2 provides that “Each House may determine the Rules of its Proceedings, punish its Members for disorderly behavior, and, with the Concurrence of two third, expel a member.”

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discuss the current 2007 Standing Orders. We start with the 2004 Standing Orders. These Standing Orders were divided into parts. They started with Part One up to Part Sixteen.⁵⁷ It is in these Standing Orders that all issues relating to business of the Parliament were stipulated. In other words, the Standing Orders are the constitution of the Parliament. Of relevance to our discussion is Part Five which dealt with “Rules of Debate.”

3.2.2 Freedom of Speech and Debate under the 2004 Standing Orders

As already stated the freedom of speech and debate is guaranteed by the Constitution. However, the manner and procedures of how to exercise this freedom by members of the House can be regulated by the House itself through its own Standing Orders. The 2004 Standing Orders provided from orders 49 to 57 on how this freedom is to be exercised. We shall examine some few provisions. The first provision is Standing Order 50. It states that:

50(1) It is strictly prohibited to tell lies in the Assembly. For this reason, any Member when speaking in the Assembly shall be responsible for the accuracy of any facts which he alleges to be true and not merely hypothetical or based on assumptions; and the Speaker or any Member may require such a Member to substantiate any such facts. A Member so required shall be responsible to provide such proof within a time frame fixed by the Speaker for that purpose.

While appreciating the Parliament’s efforts in regulating its businesses, it is a considered view that by creating this provision the Parliament made itself to enter into a very complicated terrain which created uncertainty to Members of Parliament of what to speak. The uncertainty came about because of the possibility of a member being required to substantiate what he said.

In the author’s view, the process of ascertaining whether certain facts alleged by a member are true or false cannot simply be determined by the whole Parliament sitting in the House and debate whether the facts alleged are true or not. Even the use of Parliamentary Committee of Privilege may sometimes be questionable if the Committee is not composed in such way as

57 These parts are: Introduction; Conduct of the Business of the Assembly; Meetings and Sittings; Business of the Assembly; Rules of Debate; Peace and Order in the Assembly; Validity of Business; Legislation – General Conditions; Legislative Procedures for Financial Matters; Standing Committees; Procedure for Impeachment of the President; Motion for a Vote-of-No-Confidence on the Prime Minister; Removal of the Speaker or Deputy Speaker from Office; Strangers in the Assembly; Seating Arrangements in the Assembly; and Miscellaneous Matters.

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to be impartial. Consequently, the whole process may end being politicized or politically motivated and hence cause uncertainty to members. In order to alleviate the question of whether what is being said is true or not some inquiries and investigation need to be done. There must be production of both supporting and controverted evidence to establish the truth or falsehood. But more problematic is this – If an MP alleges certain facts and it is doubtful (by another member) whether the facts alleged are true or false, and a Motion is raised that the MP provides proof, what should be the standard of proof? Or, put it in another way – What should be the standard to determine whether the MP is telling lies or truth? The 2004 Standing Orders do not provide the answer. Standing Order 50 only says that, such a member may be required to substantiate any such facts and “shall be responsible to provide such proof within a time frame fixed by the Speaker for that purpose.” This means, the MP in question bears the onus/burden of proof. But, what should be the standard of proof is not known. We shall explain, by discussing the issue of proof, why an argument is made that the Parliament has entered into a complicated terrain by having this requirement of proof in the Standing Orders.

The “standard of proof” is the level of proof required to discharge the burden of proof, i.e. to be able to convince the trier (e.g. court or tribunal) that a given proposition is true. The degree of proof required depends on the circumstances of the proposition whether criminal or civil or disciplinary. Typically, most countries have two levels of proof: First, the “balance of probabilities,” called the “preponderance of evidence” in the US,⁵⁸ (which is the lowest level of proof and used most commonly in civil suit). Under this level the person making proposition must adduce evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.⁵⁹ The second is, “beyond a reasonable doubt” (which is the highest level). This is the standard required by the prosecution in most criminal cases. This means that the proposition being presented by the government must be proven to the extent that there is no “reasonable doubt” in the mind of a reasonable person that the defendant is

58 See: Linda S Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433 (1986–1987).

59 See: *Braud v Kinchen*, La. App., 310 So.2d 657, 659, See: these cases from this note 240 to note 246 in *Burden of Proof in Divorce Cases: How to Win or Lose in Divorce Issues* at: <http://www.divorcesource.com/NJ/ARTICLES/gruber26.html>.

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guilty.⁶⁰

In addition to these two levels, courts of law have developed a body of jurisprudence which uses other words to establish another standard (which is the medium level of proof) to establish certain factual situations. The use of the words, “clear and convincing evidence” is a case in point. “Clear and convincing evidence” is the highest level of burden of persuasion sometimes employed in the Civil Procedure. To prove something by “clear and convincing evidence,” the party with the burden of proof must convince the trier of fact that it is substantially more likely than not that the thing is in fact true. In other words, it is a proof which results in reasonable certainty of the truth of the ultimate fact in controversy;⁶¹ proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. So, this is a lesser requirement than “proof beyond a reasonable doubt,” which requires the trier of fact be close to certain of the truth of the matter asserted, but a stricter requirement than proof by “preponderance of the evidence,” which merely requires that the matter asserted seem more likely true than not.⁶²

Courts of law do emphasize that the principles of due process require the application of the “clear and convincing proof” standard when the threatened loss or consequence resulting from civil proceedings is comparable to the consequences of a criminal proceeding; in that it takes away liberty or permanently deprives individuals of interests that are clearly fundamental or significant to personal welfare”.⁶³ The “clear and convincing standard” may also be imposed on a party where the adverse party is at a gross disadvantage in disputing an allegation, in order to “restore a fair balance between the adversarial positions of the parties”.⁶⁴ It has also been said that the standard is “reserved for the protection of important interests”.⁶⁵

Since requiring an MP to provide proof of the facts alleged by him cannot be equated with the criminal prosecution proof, the second burden of proof – a proof beyond reasonable doubt – cannot be used. But the crucial questions

60 See: CRM Dlamini, *Proof beyond a Reasonable Doubt: An Analysis of its Meaning and Ideological, and Philosophical Underpinnings*, 11 S. AFR J. CRIM. JUST. 423 (1998).

61 *Lepre v Caputo*, 131 N.J. Super 118, 328 A.2d 650, 652.

62 See: Steve Wexler, *Burden of Proof, Writ Large*, 33 U. BRIT. COLUM. L. REV. 75 (1999-2000).

63 See: for example, *In re Polk License Revocation*, 90 NJ 550, 563 (1982).

64 *State v Sugar*, 100 NJ 214, 239-240 (1985).

65 *Caro v Sher*, 296 NJ Super. 594, 602 (Ch. Div. 1996).

are: Which among the two other proofs should be used between the “balance of probability” and “clear and convincing evidence,” and against whom and whom? Assume the MP in question produces evidence to support his allegation which he reasonably believes and continue to believe, however mistakenly he/she might be, that the facts he alleges are true, and probably his evidence establishes a *prima facie* case that, what he is alleging is true, but the Parliament, by a process of resolution, is not satisfied with the proof. Then, who bears the burden to show that the allegations are false (lies)? It should be noted that when the debate on a motion concludes in Parliament the motion is put to a vote. The MPs vote by voice vote. The presiding officer, the Speaker, puts the question, and members respond either “yea” (in favour of the motion) or “nay” (against the motion). The presiding officer then announces the result of the voice vote.⁶⁶

The question of who bears the burden of proof is a critical one, because according to Standing Order 59(3) where a member who is ordered to provide proof “fails to give such proof to the satisfaction of the Assembly,” any other member who “feels that the lie spoken by the offending Member is grave and its magnitude is to the extent of affecting the esteem of the Assembly,” he may make “a Motion that the offending Member be suspended from the Assembly for a specific period which shall be mentioned in his Motion.”⁶⁷ What it means here is that, the alleged offending Member faces a risk of being punished by suspension (or any other punishment) from the Parliament if the Motion, after being debated just like any other Motion,⁶⁸ is supported by majority members by the simple voice vote of “*Ndiyo*” in Swahili, which means “Yes”. The imposition of suspension has a double effect; to the affected Member himself and to his constituency. He shall not be able to re-enter in any part of the Assembly debating Chamber throughout the period of his suspension, and any remuneration to which he is entitled to be paid shall cease for the whole period of his suspension.⁶⁹ And, his constituency will not be represented during the whole period of his suspension from the Parliament. In fact, the imposition of punishment is done as a disciplinary penalty. Disciplinary proceedings are neither civil nor criminal but are *sui generis*.⁷⁰ Usually, except as otherwise provided, the rules of civil procedure

66 In Swahili the Speaker will ask the Members to say “*Ndiyo*” in favor of the Motion or “*Siyo*” (against the Motion), and announce the result basing on which voice was stronger than the other.

67 See: Standing Order 59(3) of the Tanzania Parliamentary Standing Orders 2004.

68 *Ibid.*

69 *Ibid* Standing Order 61.

70 See, for example, the American Bar Association, *Model Rules for Lawyer Disciplinary Enforcement*, at

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and rules of evidence in civil matters apply in disciplinary proceedings.⁷¹ In this regard the standard of proof is either on the balance of probability or clear and convincing evidence.

Since expulsion of a member of parliament results in loss of rights and privileges as a member, which may be regarded as unpleasant, it constitutes a punishment and will do so when it is imposed because the member in question has infringed rules of conduct which the House expelling him treats as rules he is obliged to observe.⁷² These consequences, in a considered view, demand that before any punishment is imposed to a member of parliament in question the burden of proof should shift to the Parliament *i.e.*, “he who alleges must prove”) to establish that the facts alleged by the Member are nothing but lies. The reasoning here is that at this stage the Parliament is playing the role of the Plaintiff or Prosecutor by alleging that its member is telling lies. Proof must, therefore, be produced to establish within a certain standard that the facts alleged by the member were lies and were made with knowledge that the same are not true. The burden of proof cannot rest solely with the author (member) especially considering that the author and the State do not always have equal access to the evidence and frequently the State alone has access to most relevant information.⁷³

It should be within the power of the Parliament to decide as to what standard the proof should be required. But, as already observed, courts of law do emphasize that the principles of due process require a higher standard of proof when the consequences are comparable to the consequences of criminal proceeding⁷⁴ or where the adverse party is at a gross disadvantage in disputing an allegation, in order to “restore a fair balance between the adversarial positions of the parties.”⁷⁵ In Tanzania, the duty to adhere to due process are even more required taking into account the provision of section 29 of the Parliamentary Immunities, Powers and Privileges Act, 1988. This section states that: “Any proceedings before the Assembly or a Committee thereof at which any person gives evidence or produces any document, shall be deemed to be judicial proceedings for the purposes of sections 102, 106, 108 and 109 of the

<http://www.abanet.org/cpr/disenf/rule18.html>.

71 *Ibid* Procedure for Disciplinary Proceedings, Rule 18.

72 See: Enid Campbell, *Expulsion of Members of Parliament*, *supra* note 36 at 30 of Chapter two.

73 See: e.g., *Information handbook for Employment Insurance Board of Referees, Nature of Proof*; available at: http://www.ei-ae.gc.ca/eng/board/tribunal/chapter_3-1.shtml.

74 See: cases *supra* note 64 and 65.

75 *State v Sugar*, 100 NJ 214, 239-240 (1985).

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Penal Code.”⁷⁶ The logical interpretation here is that, in the event a Member of Parliament is alleged to have committed Contempt of parliament, just like any other individual who may be held so, this provision may be invoked; since the provision uses the words “any person.” It seems that it does not matter whether an individual is an MP or a non-MP.

In this regard, the right of freedom of speech and debate which is jealously guarded by the Constitution and its importance to Members of Parliament to participate in parliamentary businesses is very fundamental interest which should not be taken away easily.

This argument should not be mistaken for hostility to the Standing Orders and probably that, what is being advocated for is members of parliament to say anything. Rather, we are trying to analyze the adverse consequences of having such kind of provision in the Standing Orders. We do not think it is important to have a provision which requires members of parliament to substantiate what they are saying. This research has not been successful in finding out any democratic country where members of parliament are required to provide proof for what they say in the House. Neither in the UK, where the Tanzanian legal system relies heavily, nor in South Africa which is a good example of democratic country in Africa, have such a requirement.⁷⁷

It can, therefore, be submitted that the existence of freedom of speech and debate; the importance of parliament in overseeing the government; and the legal intricacies involved in proving or disproving whether the facts alleged by a Member are true, cannot let such a requirement find its place in the parliamentary rules or standing orders of any democratic parliament worth its soil.

Before we venture to examine the best practice from other countries let us now examine a recent suspension of a Member of Parliament in Tanzania

76 These are provisions relating to perjury. For example section 102 of the Penal Code, Chapter 16 states that:

102(1) Any person who, in any judicial proceeding ... knowingly gives false testimony touching on any matter which is material to any question ... is guilty of the offence termed “perjury.”

(2) Any person who aids, abates, counsels, procures or suborns perjury is guilty of the misdemeanor termed “subornation of perjury.”

77 In a discussion with one of my colleagues from Democratic Republic of Congo (DRC), Anne Rashidi Mulumba, she said that in DRC there is a similar requirement. Did Tanzania get it from there? It is not certain! It is my view that if this requirement was obtained from DRC or any other country it is not a good example to emulate. Before Tanzania starts to borrow a leaf from other countries it should study the whole democratic structure and institutions of that country. We cannot just take examples from any country, even from those whose structures are questionable.

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that we referenced in the introductory part of this work.

3.3 DISCIPLINARY MEASURES IN PRACTICE IN TANZANIA PARLIAMENT

Contempt of Parliament is ancillary to privilege and to constitute a contempt an act or omission must obstruct or impede the House (or a committee of the House). Just like any other person who is not a member of parliament can be held liable for contempt of Parliament so does a member of parliament.⁷⁸ In fact, the rationale is to preserve the integrity of the parliament. It is the powers which have been held to be necessary for self protection.⁷⁹ It includes the power to suspend a member of the House for disorderly conduct in the course of parliamentary proceedings and to exclude him from the legislative chamber for the period of suspension.⁸⁰ In this context considerable latitude has been allowed to the House in the adoption of its own rules governing the conduct of proceedings and prescribing the grounds on which a member is liable to be suspended from the service of the House.⁸¹

In Tanzania, among matters which Members of Parliament are prohibited from speaking by the Parliamentary Standing Orders include, telling lies in the Assembly. Other matters are such as: any matter which is still pending before the court (*sub judice* rule);⁸² the use of the name of the President scornfully during a debate, or for the purpose of influencing the Assembly to decide on any matter in a certain way⁸³ (it is not defined what can amount to scornful); the use of offensive language or expressions; the use of Member's right to free speech for the purpose of obstructing the business of the Assembly (it is not even clear what kind of speech can tantamount to obstructing the business of the Assembly); imputation of improper motives on another Member or make personal attacks against another Member (except by giving a substantive Motion on the conduct of such Member); and indulge in speaking about the personalities of others, or bring political debates in the Assembly⁸⁴ (what are personal attacks and political debates are also not defined).

78 See: the U.K Parliament Report <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/43ap32.htm>.

79 Enid Campbell, *Expulsion of Members of Parliament*, *supra* note 8 of Chapter 2.

80 *Ibid* at 24.

81 *Harnett v Crick* [1908] AC 470.

82 See: Standing Order 50(3).

83 *Ibid* Standing Order 50(5).

84 *Ibid* Standing Order 50(8).

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Most of these prohibitions are vague or ambiguous. They are likely to create diverse interpretations which can only be resolved by courts of law. At least, people have faith with courts when it comes to interpretation of laws. The interpretation by the Parliament itself or its Speaker is sometimes likely to be disputed by others. Some members may be aggrieved with in-house interpretations and particularly because the composition of the Parliament is polarized in terms of majority ruling party and the opposition minority. In other words, the above provisions being vague as they are might have created an impossibility to arrive at an interpretation capable of mustering general support of all members. Consequently the provisions might adversely impact on the freedom of speech for members and especially the minority when votes are cast on party lines, since it is usually the case that once decision is passed in Parliament there is no appeal mechanism to any other body.

Let us now see what happened in Tanzania on 14 August 2007. A Member of Parliament from the opposition camp, Honourable Zitto Kabwe (the “MP”) was suspended from the House on the ground that he humiliated the then Energy and Mineral Minister, Honourable Nazir Karamagi (the “Minister”). The alleged humiliation arose out of the debate in the House when the MP proposed of his intention to present a private motion, which he consequently presented on 14 August 2007. The Motion proposed the formation of a Parliamentary Select Committee to investigate two issues: First, the mining concessions and the circumstances which led to the signing of a new mining concession (Buzwagi Contract) by the Minister, in London February 2007.⁸⁵ Secondly, the removal of the provision in the Income Tax Act, 1973 of additional capital allowance of 15% per annum applied to the balance of unredeemed qualifying capital expenditure to mining companies, without the approval of the Parliament.

The MP asserted that the circumstances surrounding the signing of the Buzwagi Contract were dubious since the signing was done while the President had already made a statement in Parliament on 30 December 2005 to the effect that the Government was reviewing existing mining contracts in order to determine areas which need improvements; and the MP questioned why the contract was signed in London. As to the second question, he expressed his doubt that the provision at issue was removed from the law without parliamentary approval, thereby proposing a Select Committee to be formed to investigate these matters so that the doubts can be cleared.⁸⁶

⁸⁵ See the Parliamentary Proceedings (*Hansard*) of August 2007.

⁸⁶ *Ibid* at 24–29.

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When it was the turn for the Minister to answer the allegations contained in the MP's Motion the Minister started by a complaint. He observed that while the MP was making an oral notice to table a private motion on 16 July 2007, the MP told the Parliament that he (the Minister) was "wrong or lied to the Parliament" when he was explaining the two issues above. The Minister refuted this. He continued to answer those issues. He started by answering the second issue. He explained that the amendment was done in 2001 by the Finance Act, number 14 of 2001 and he submitted the Act as a proof. He also stated that when 15% additional capital allowance on unredeemed qualifying capital expenditure was removed, a mistake was done by not considering the existing mining contracts and hence in 2002 through the Finance Act of 2002, the provision was reinstated for all mining companies which had contracts with the Government before the law was amended. This was enough to explain the doubt of the MP.

However, this answer did not mean that the MP was wrong in casting a doubt. A close examination of the whole debate from the *Hansard* shows that in 2002 the then Minister of Finance, Honourable Basil Mramba, when presenting the Government Budget noted that the Government was intending to reinstate "the additional 15 percent capital allowance on unredeemed qualifying capital expenditure as set out in the Mining Act, number 5 of 1998." In his Motion the MP was doubtful how the provision which was not repealed was being reinstated? The fact here is that it is this statement of the former Minister of Finance which made the MP to cast the doubt. In fact the provision in question was not in the Mining Act, 1998 but was in the Income Tax Act, 1971. It is actually the Minister of Finance who made a mistake when he mentioned the Mining Act instead of the Income Tax Act. And, it appears that the MP started his inquiry from there without knowing that the relevant law that was amended was the Income Tax Act and not the Mining Act. In fact, this was an error which Minister Karamagi was supposed to make it clear when answering the Motion without starting to attack the MP by uttering more disturbing statements. For instance, he said, "... a rigorous government like our government does not lie ... it is the mover of the Motion who lied to the Parliament and the Tanzanians who listened to him for not being careful with his statement in Parliament."⁸⁷ More problematic was this statement which he repeated:

Nataka kurudia, ni dhahiri hoja yake imejengwa kwa manzingira ya uzushi yenye malengo makuu mawili, kwanza kuchonganisha Bunge lako Tukufu na Serikali na pili kuwapotosha

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wananchi juu ya sheria zinazotungwa na Bunge lako Tukufu kwa nia ya kujitafutia umaarufu usiokuwa na msingi (cheap popularity).⁸⁸

Literary the Minister was saying that it is clear the MP made his Motion with two motives, first, to instigate animosity between the Parliament and the Government, and secondly, misrepresent the citizens about the laws made by Parliament for the purpose of gaining cheap popularity.⁸⁹

On the issue of Buzwagi Mining Contract the Minister explained why he decided to sign the contract in London. He said that all the requirements necessary to the signing of the Contract were completed and when he was in his long visit outside the country he thought it wise to sign the contract in London because the delay in signing would have the impact of jeopardizing the interest of the State. He mentioned a couple of benefits that the country will benefit from the contract, which was good (if it was really true) because the Parliament had not been told before; let alone being told that there was a contract which was signed by the Government. He simply dismissed as irrelevant whether the contract was signed in London or Dar es Salaam. As to the question why he signed the contract while the President had already intimated that there will be no other contracts until the reviewing process of existing contracts is completed, the Minister told the Parliament that the Committee which was formed by the President for that purpose had already completed its work and submitted its proposal to the Government on 14 September 2006. He made it clear that some of the Committee's recommendations were taken into account during the negotiation of the Buzwagi Contract thereby making it better for the benefit of the Nation.⁹⁰ This was also a nice thing because the Parliament had not been informed before whether the job had already been done and completed.

In providing more answers to both issues raised by the MP, the Minister continued to attack the MP. He did not only answer the questions raised but continued throwing words to the MP, for example, he said that the MP was speaking things which he does not have competence.⁹¹ He advised the MP to "educate himself on the country's laws on minerals." He also told the MP to desist from making allegations before doing enough research,⁹² quoting an

88 *Ibid* at 36.

89 An attempt is being made in this work to translate with due care the statements made in Parliament which were uttered and recorded in Swahili language in the *Hansard*.

90 *Ibid* at 33.

91 *Ibid* at 35.

92 *Ibid* at 36.

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often cited adage – ‘no research no right to speak’, etc. Finally he made a plea to the Parliament that it should examine all the evidence submitted by him and those submitted by the MP to determine who is speaking lies between him and the MP.

After careful examination of all the responses of the Minister one is left to wonder -- Who is using more offensive or abusive language between the MP and the Minister? Where does a Minister get such courage to answer the MP in an arrogant manner like that? To ask another genuine question – Are these statements of Minister not falling under the prohibitions of Standing Orders?

After the Minister had finished responding to the Motion, the Speaker gave opportunity to Members of Parliament to debate the Motion. The Parliament was quite divided between the opposition and the ruling party. Of all seventeen MPs who debated the Motion, those from the opposition side – eight members – supported the Motion that a Select Committee be formed because it was not clear who was telling the truth between the Minister and the MP and whether what the Minister had said was whole true. Those from the ruling party – nine members – opposed the Motion arguing that the Minister’s answers were quite in depth and there was no need to form a Committee. When it was time to pass a final resolution the majority won, and the MP’s Motion failed.

However, among those who opposed the Motion from the ruling party, some proposed a disciplinary action be taken against the MP in question by suspending him from the Parliament on the ground that, when the MP on 16 July 2007 was making an oral notice to the Speaker intimating that he is proposing to bring a private motion he used an abusive language against the Minister and his Motion showed that he has lied to the Parliament. The MP was quoted in the *Hansard* saying that, “the Honourable Minister has made statement which is not true, he has lied and he has stated things which are not in fact contained in the Contract he has signed.” Based on this statement they argued that since the Minister has answered all claims it was clear that it was the MP who was lying. They, therefore, proposed that strong action should be taken against the MP which would act as a lesson to others because, according to them, the MP’s lies were so grave such that they had affected the esteem of the Assembly. Honourable Mudhihir M Mudhihir, who was the first to make such a proposal, stated, *inter alia*, that:

Honourable Speaker, arising from violation of Standing Order 50(1) of stating lies against another and defamed him, I am of the view that the one who stated lies is the mover of the Motion than the one against whom the allegations were made, and on that basis ... I request to use Standing Order 59(3) that, for this kind of

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behaviour done by our fellow, Honourable Kabwe Z Zitto, he should be suspended from parliamentary meetings from today and the whole of forthcoming 9th Assembly. We should meet him here in the Assembly by January (Applause).⁹³

Just after passing the resolution rejecting the MP's Motion, which was done by a vote of voice ("yea" or "nay") the Speaker of the Assembly allowed the discussion of the Motion to suspend the MP from the Parliament as per Standing Order 59(3).⁹⁴ It is here the confusion in the Parliament began. Some members of parliament mixed two separate things together, namely, telling lies and using abusive language. Instead of dealing with the issue that the MP used abusive words by calling the Minister a liar, they concentrated on the issue that the MP told lies in Parliament. These are two distinct issues which attract different procedures and different outcomes. It is obvious that the MP was wrong under the Standing Orders by saying that the Minister "lied to the Parliament," since this statement is equivalent of calling the Minister a "liar," which is prohibited by most parliaments as we shall see later. However, as to the question whether the MP had told lies, the Parliament had to invoke the proper procedure in accordance to its Standing Orders. Standing Order 59(3) for which Honourable Mudhihir proposed to be used states as follows:

59(3) Where by the end of time allotted, a Member ordered to substantiate the truth of his words pursuant to Standing Order 50(1) refuses or fails to give such proof to the satisfaction of the Assembly, then the Speaker shall take disciplinary measures against such Member pursuant to Standing Order 59(2).⁹⁵ But if any other Member feels that the lie spoken by the offending Member is grave and its magnitude is to the extent of affecting the esteem of the Assembly, he may forthwith move a Motion that the offending Member be suspended from the Assembly for a specific period which shall be mentioned in his Motion.

It follows that, after Honourable Mudhihir had made a Motion to suspend Honourable Zitto Kabwe from the Parliament because the breach was too

93 *Ibid* at 71.

94 Standing Order 50(1) states, "It is strictly prohibited to tell lies in the Assembly. For this reason, any Member when speaking in the Assembly shall be responsible for the accuracy of any facts which he alleges to be true and not merely hypothetical or based on assumptions; and the Speaker or any Member may require such a Member to substantiate any such facts. A Member so required shall be responsible to provide such proof within a time frame fixed by the Speaker for that purpose." [Emphasis mine]

95 Standing Order 59(2) provides a penalty for which the Speaker can impose on a member if a member uses words or language prohibited in the Assembly, for example abusive, insulting or offensive language, and if he is called to withdraw his statements, words, language or expression he hesitates or refuses to do so. Then, the Speaker can direct such member to withdraw from the Assembly and remain outside for the remainder of the sitting of that day.

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serious, the crucial issues which the Speaker was supposed to resolve before the imposition of any punishment to the MP, were four: first, whether the MP had told lies; secondly, whether the Speaker or any Member had required the MP to substantiate his claim within a certain time frame; thirdly, whether the time which the MP had been given to substantiate his words had come to an end; and fourthly, whether the MP had refused or failed to give such proof to the satisfaction of the Assembly.⁹⁶ Members from the opposition side who participated in debating this Motion, who were Honourable Dr Wilbrood P Slaa; Honourable Chacha Z Wangwe; and Honourable Phares K Kabuye, seemed to understand well the applicability of the Standing Orders than the Members from the ruling party who participated in the debate, and who unfortunately were simply pushing for the MP to be punished.

The Speaker lost a precious opportunity to make a correct ruling which would have helped the Parliament from not violating its own Standing Orders. For example, Dr Wilbrood Slaa noted that, what was before the Parliament was a Motion to form a Select Committee and not whether the MP had told lies. If the Parliament wanted to inquire whether it was the MP and not the Minister who had told lies then documentary evidence from both sides (the MP and Minister) should be submitted and a Special Committee be formed to examine them to determine whether the MP had lied or not. Honourable Chacha Wangwe stated that it was important to know who bears the burden of proof. He asked, “If there is a Member of Parliament who feels that another Member is telling lies ... who has the burden of proof; the one who alleges that an MP has told lies or the one who is alleged to have told lies?” He continued to argue that the one who brought the Motion that an MP is telling lies should be the one who bears the burden of proof. Honourable Phares Kabuye also showed his consternation. He asked that, if the MP has brought his Motion and it appeared that the Motion has failed, how come “the charge created another charge.” In fact Honourable Kabuye meant that, how come the MP, who had brought a Motion challenging the Minister, ultimately found that the wind is changed against him and was now accused of telling lies? The arguments of opposition MPs were quite reasonable and they got it right, but the Speaker opted to brush them aside.

Before the 2007 Standing Orders came into effect, the author’s considered views were that, if Standing Order 50(1) had to continue to remain in the same way as it was, which, as we have already found, is unnecessary in a

democratic parliament, there should have been two burdens. One, if the Speaker or any other Member alleges that an MP is telling lies and requires the MP to substantiate his claim, the MP should only bear a duty to establish a *prima facie* case to show that he has a reasonable ground to believe what he says is true. Two, if he discharges this burden, and before any action is taken, the burden should shift to the Member or the Minister who alleges that the MP is telling lies by providing sufficient evidence showing that what the MP has said is nothing but pure lies. This is in consonant with the long established principle that “he who alleges must prove.”⁹⁷ Arguably, this burden of proof may entail a higher standard of proof because the proposal has the adverse consequence to the MP in question and his constituency. And, as we have already argued, this process of determining truth and lies is a process which should not be done by the entire Parliament, but at least a Committee consisting of few impartial members, because it is akin to judicial proceedings where fair hearing and/or representation should be afforded to both parties. Finally, the recommendations of the Committee should be tabled before the whole Parliament. This is not a simple process taking into account the esteem of a Member of Parliament and his right to say honestly what he feels is reasonable. This freedom is protected not only in Tanzanian Constitution but it is a privilege given to most parliamentary houses in the world.

As we have noted, the Speaker of the National Assembly failed to seize the opportunity of directing the House the proper interpretation of the Standing Orders. As Professor Issa Shivji noted there was nothing before the House to make Standing Order 59(3) to come into play. There was no ruling by the Speaker, when Honourable Zitto Kabwe gave his oral notice, that he had told a lie in the course of his speech. There was no statement by the Speaker identifying the lie. There was no Order by the Speaker giving Honourable Zitto Kabwe time to prove his statement. As no time was given, at no point in time had the time expired. Therefore, because there was no time given and no expiry time, in law, Honourable Mudhihir had no basis for moving the motion.⁹⁸

One could make an argument by saying that Honourable Zitto Kabwe was willingly to accept the punishment since he did not protest when he was called by the Speaker to say something; instead he remarked, “Honourable Speaker, I am a democrat. I am ready for any decisions that the Parliament can

97 *State of Wisconsin v Royce*, 02- 1469 Cir. Ct (2003).

98 Issa Shivji *supra* note 96.

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take.”⁹⁹ The Human Rights Committee (UN- Committee established under the ICCPR) had an occasion to rule that: “It is incumbent on States to ensure the rights of persons and not incumbent on the latter to request protection.”¹⁰⁰ Applying this ruling as analogy, we can say that it was not incumbent on the MP to request protection. The Parliament under the chairmanship of the Speaker should have satisfied itself that it was trading in the right course before imposing punishment to Honourable Zitto Kabwe.

Needless to say, by any measure of standards the Parliament’s practice in this event fell short of the minimum legal procedures. From this basis it can legitimately be claimed that, the Parliament violated its own Standing Orders and imposed punishment to the MP which would not have been authorized before the legal procedures had been followed. Even if truly the MP had deliberately told lies to the Parliament, the legal due process was supposed to be followed.

3.4 WHAT REFORMS HAVE BEEN DONE UNDER KANUNI ZA KUDUMU ZA BUNGE (STANDING ORDERS), 2007?

The new Standing Orders of 2007 wanted to cure some mischief which were found in the above discussed 2004 Standing Orders. One of the major complaints among the Members of Parliament was on the burden of proof. It was the view of some members that if there is reason to believe that another member is telling lies, the one who alleges so should bear the burden of proof. It is important now to examine some provisions in the new *Kanuni za Kudumu za Bunge*, 2007 Edition to see what major changes have been done and try to discuss whether those changes are helpful in so far as the discussion on the freedom of speech for Members of Parliament is concerned.

The relevant standing orders range from Standing Order 63 to Standing Order 76. We shall discuss, in particular, Standing Order 63. The provisions of Standing Order 63 which prohibit Members of Parliament to make untrue statements in the House have somehow been improved compared to the former Standing Order 50 of the 2004 Standing Orders. Standing Orders 63(1) and (2) state that:

99 *Hansard* at 104.

100 *Yekaterina Pavlona Lantsonva (Represented by his mother Karina Moskalenko) v Russia Federation*, Communication number 763 of 1997, paragraph 9.2. In this case the mother of a victim who died in the prison owing to deplorable prison condition sued the state. The state argued that neither Lantsonva nor his co-detainees had requested medical help in time while in detention. The Committee rejected that argument.

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- 63(1) Without prejudice to the provisions of article 100 of the Constitution which protect and guarantee the freedom of speech and debate in the Assembly, it is strictly prohibited to tell lies in the Assembly and for this reason, any Member when speaking in the Assembly shall be responsible for the accuracy of any facts which he alleges to be true and not merely hypothetical or based on assumptions.
- (2) Any Member when speaking in the Assembly will not be presumed to tell lies if he is referring to information concerning a certain event which was broadcasted or written by any media.

At least, the above two provisions try to preserve the freedom of speech and debate in the parliament by stating that these provisions do not intend to inhibit Article 100 of the Constitution, but only require members to be careful when making statements in the Parliament to ensure that their statements are true. Similarly, it is allowed for members to make reference to the media when they are speaking on certain things.

However, with regard to the burden of proof when it is alleged that an MP has told lies in the Assembly, it is the author's view that, this area will continue to be problematic if sufficient cautions are not taken. The reason is that there are two provisions which appear to be in conflict and hence remove the whole rationale of reforming the previous 2004 Standing Orders in this aspect. For instance, Standing Order 63(3) provides that any Member may stand; and after being allowed to speak by the Speaker, may claim that another Member who was speaking before him has told lies. The good thing with the subsequent sub-standing order (that is Standing Order 63(4)) is that if such allegation is being made that another Member has told lies, the Member who is so alleging shall be responsible to adduce proof to "the satisfaction of the Assembly" about the truth of the matter. This is a very good provision since, as we stated previously, the burden of proof should always be on the one who alleges; i.e. "he who alleges must prove." The controversial provision is Standing Order 63(5) which seems to override and render Standing Order 63(4) meaningless if it will not be construed strictly. The former provision states that:

- (5) Without prejudice to the provisions of the above sub-standing orders of this Order, the Speaker or any other Member, after making short statement of the evidence which creates obvious doubt about the truthfulness of the claim, words or statement made by a Member of Parliament, he may require such a Member to adduce proof of the truthfulness of the claim, words or statement made by him and if he fails to do so, he should withdraw his claim or words or statement.

In addition to the above provision, the other provisions which go together are the following:

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- (6) The Member who has been required to substantiate the truth of his claim, words or statement which he made in the Assembly shall be required to offer such proof to the satisfaction of the Assembly, either on the spot or in such duration as he shall be given by the Speaker for that purpose.
- (7) If a Member who has been required to substantiate his claims, or words or statement made in the Assembly fails to do so, he may decide to alter his position by withdrawing his claim or words or statement either on the spot or within such time as he shall be given by the Speaker for the purpose of substantiating his words or statement.
- (8) Where by the end of time allotted, a Member ordered to substantiate the truth of his claim or words or statement made in the Assembly refuses or fails to give such proof to the satisfaction of the Assembly and if he refuses to alter his position by offering to withdraw his claim or words or statement, then the Speaker shall punish such Member by suspending him from attending not more than five Parliamentary meetings.
- (9) If any other Member feels that the lie spoken by the Member is grave and its magnitude is to the extent of affecting the esteem of the Assembly, he may forthwith move a motion that, such Member:
 - (a) where that is his first offence, be suspended from attending not more than ten parliamentary meetings;
 - (b) where that is his second or more offence, be suspended from attending not more than twenty parliamentary meetings;
 - (c) be given other disciplinary penalty which shall be mentioned in his motion.

These provisions have been cited here for purpose of showing how the issue of telling lies by a member of parliament is being dealt with by the Standing Orders. As it appears, while Standing Order 63(4) vests the onus of proof (to the satisfaction of the Assembly) to a Member who alleges another Member is telling lies, Standing Order 63(5) only requires the Speaker or any other Member to give short evidential statement which establishes a *prima facie* case that raises a doubt to the statement or words made by another Member who is alleged to have told lies; and whereupon requires such Member to substantiate his claim, words or statement. The logical interpretation of these two provisions seems to be that, there are two approaches of dealing with the claim that a Member of Parliament is telling lies. First, by requiring a Member who is alleging that another Member is telling lies to offer proof to the satisfaction of the Assembly to show that what the other Member was saying was a lie, by giving the evidence which show the truth of the matter. This is the correct and more logical requirement. The second approach is almost

similar to what was found in the 2004 Standing Orders, which requires a Member who is alleged to have told lies in the Assembly to prove that his claim or statement is not a lie, otherwise he should withdraw his claim or statement. The wording of Standing Order 53(5) shows that, what the Speaker or any other Member is required to do is not to offer proof to the satisfaction of the Assembly that another Member is telling lies, but only to raise a doubt on the claim or statement made by such Member. This is what we may call, 'raising a *prima facie* evidence.' Upon raising such doubt the burden of proof is shifted to the maker of the claim or statement, or else other consequences will follow.

It is crystal clear that the 2007 Standing Orders have not actually changed the situation. In actual fact, the burden of proof is still with the 'accused' Member of Parliament. There is no any provision which bolster the burden of proof to the "one who alleges." Even assuming that, under Standing Order 53(4), a Member who is alleging that another Member has told lies and probably is required to offer proof to the satisfaction of the Assembly, fails to do so what action can be taken against him? The provisions of the Standing Orders are silent. Probably, the assumption here was that in the event a Member will be required to do so, he can not fail to discharge his obligation and that is why there are no any consequences that follow. But, simply because it is well known or presumed that, when a Member who is alleged to have told lies in Parliament is required to substantiate his claim, words or statement may fail to do so, that is why the consequences are well stipulated by the Standing Orders. This continues to create the same dilemma or anxiety to the Members of their freedom of speech and debate in Parliament.

However, since the 2007 Standing Orders are fairly new, it remains to be seen how the Speaker and the Parliament in its entirety will use fairly such orders without unnecessarily curtailing or limiting the freedom of speech and debate of the Members. In my view, the proper course to take, at least, was to vest the responsibility of offering a *prima facie* evidence to the Member who is making a certain claim or statement to show that what he is claiming or stating is true or he has the reason to believe to be true. And, vesting the burden of proof to the standard that we referred earlier to a Member (be it an ordinary Member or a Minister or Speaker) who is alleging that another Member is telling lies. We would, however, agree on the exceptional situations to vest the burden of proof to the maker of the claim or statement if such a maker is a Minister. The rationale here is that, since the Ministers are individually and collectively responsible to the Parliament, they are required always to verify what they are saying in the Assembly. They have all the means and opportunity to know the truth of all matters which they are reporting to the Parliament unlike other ordinary Members of Parliament who

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sometimes are entitled to rely on some sources which may not be reliable. So, when these other Members are making claims, allegations or statements in Parliament they are doing so to awake the government in order for the government to come forward and offer clarification on the issue. It is something common for the government to be awakened to release information or offer explanation on matters which Members of Parliament want to hear. If this was not the case, Members of Parliament would fail or become afraid to say what they have heard, or told or suspected regarding certain issues of public importance.

The next chapter tries to draw best practices from other countries which have similar parliamentary systems.

CHAPTER FOUR

PRACTICE FROM OTHER JURISDICTIONS

4.1 BALANCING FREEDOM AND REPUTATION OF OTHERS

In most countries freedom of speech and debate is subject to certain restrictions, and certain declarations or behaviour are deemed inadmissible and may not be covered by the privilege. However, what matters is what those restrictions are. In most Commonwealth schemes, the procedure of parliament does not involve the parliament nor its privileges committee from deciding the truth of statements made in the House. What is required is that the privilege of freedom of speech in Parliament places a corresponding duty on every member to use the freedom responsibly.¹ The UK Parliament says that, “the duty is all the greater now that the debates of the two Houses may be broadcast live anywhere in the world. For Parliament itself to make detailed rules on what may be said in Parliament would destroy the privilege, and this course has always been shunned. The rules and conventions which apply to debate in both Houses are directed primarily towards achieving orderly debate and good temper, not to restricting the subject matter of debate.”²

The restrictions on the freedom of speech and debate are based on the rules of parliament and aim only to ensure the good order of meetings.³ It is the Speaker/President of the House or chairman of the parliamentary committee (if the debate is held by the committee) who is the presiding officer and controls the decorum of the debate. Put it differently, the Speaker presides over the house’s debate, determines who should speak and is responsible for maintaining order during debate. Conventionally, the Speaker is required to remain non-partisan, and renounces all affiliations with his former political party when taking office.⁴ The Speaker does not take part in

1 See: the UK Parliament, *Parliamentary Privilege- First Report*; *supra* note 50, at Chapter 2 paragraph 188.

2 *Ibid.*

3 See: Robert Myttenaere *supra* note 2 of Chapter 2 at 111.

4 This is the practice in UK. Upon election, the Speaker, by convention, breaks all ties with his or her political party, as it is considered essential that the Speaker be seen as an impartial presiding officer. In many cases, individuals have served in ministerial or other political positions before being

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debate nor vote (except to break ties, and even then, subject to conventions that maintain his or her non-partisan status). Aside from duties relating to presiding over the House, the Speaker also performs administrative and procedural functions.⁵

4.1.1 Rules of Debate that Control Speech

During debate, the Speaker is responsible for maintaining discipline and order. He or she rules on all points of order (objections made by members asserting that a rule of the house has been broken). The Speaker bases decisions on the rules of the house and on precedent; if necessary, he or she may consult with the parliamentary clerks before issuing a ruling. The privilege of freedom of speech to members is not limitless. However, it is greatly preserved. For instance, the Rules of the House for the US House of Representatives⁶ which are more or less identical to those of the Senate are governed by the following precedent:

The freedom of speech in debate in the House of Representatives should never be denied or abridged, but freedom of speech in debate does not mean license to indulge in personal abuses or ridicule. The right of Members of the two Houses of Congress to criticize the official acts of the President and other executive officers is beyond question, but this right is subject to proper rules requiring decorum in debate.⁷

Based from this, the House Rules have been drafted in such a way that neither the freedom of speech is impeded nor the House is reduced to be a place where the reputations of others are unnecessarily harmed. As a guide for debate, a Member should avoid impugning the motives of another Member, the Senate or the President; using offensive language; or uttering words that are otherwise deemed “unparliamentary.” These actions are strictly against the House Rules and are subject to a demand, when made, that the words be taken down. A demand that the Member’s words be taken down will result in

elected Speaker. For example, Selwyn Lloyd and George Thomas (Speakers during the 1970s and early 1980s) had both previously served as high-ranking Cabinet members, whilst Bernard Weatherill (Speaker from 1983 to 1992) was previously a party whip. See: the House of Common information office at <http://www.parliament.uk/documents/upload/m02.pdf>.

5 This is the practice in UK and is applicable to the Speaker of the House of Commons. See The Diary of Samuel Pepys, *The Speaker*. Available at <http://www.pepysdiary.com/p/403.php> (accessed 22 March 2008).

6 See: *Constitution, Jefferson's Manual, and Rules of the House of Representatives* 110th Congress, (House Document number 109-157).

7 Taken from Cannon's Precedents, Volume 8, and section 2497.

the Clerk reporting the words and the chair ruling on the propriety of the words.⁸ The offending Member may obtain unanimous consent to withdraw the inappropriate words or the demand may be withdrawn. Following such a withdrawal the Member proceeds in order.

However, if the Member's words are ruled out of order, the words may be stricken from the Congressional Record (*Hansard*) by motion or unanimous consent, and the Member will not be allowed to speak again on that day except by motion or unanimous consent. According to the Congressional practice, it is permissible in debate to challenge the President on matters of policy. The difference is one between political criticism and personally offensive criticism. For example, a Member may assert in debate that an incumbent President is not worthy of re-election, but in doing so should not allude to personal misconduct. By extension, a Member may assert in debate that the House should conduct an inquiry, or that a President should not remain in office.⁹ Under section 370 of the House Rules and Manual it has been held that a Member could:

- (a) refer to the government as "something hated, something oppressive".
- (b) refer to the President as "using legislative or judicial pork".
- (c) refer to a Presidential message as a "disgrace to the country".
- (d) refer to unnamed officials as "our half-baked nitwits handling foreign affairs".

Likewise, it has been held that the following expressions are "unparliamentary language,"¹⁰ and members could not use them:

- (a) call the President or another Member a "liar".
- (b) call the President a "hypocrite".
- (c) describe the President's veto of a bill as "cowardly".
- (d) charge that the President has been "intellectually dishonest".
- (e) refer to the President as "giving aid and comfort to the enemy".

8 See: Words Taken Down (Clause 4 of Rule XVII) of the Rules of the House.

9 See: *Decorum in the House and in Committees*, discussed at <http://www.rules.house.gov/POP/pop0998.htm> (accessed 22 March 2008).

10 Unparliamentary language is words or phrases that are deemed to be inappropriate for use in the House whilst it is in session. This includes, but is not limited to the suggestion of dishonesty and foul language or profanity. Exactly what constitutes unparliamentary language is generally left to the discretion of the Speaker of the House. Part of the Speaker's job is to enforce the Assembly's debating rules, one of which is that members may not use "unparliamentary" language. That is, their words must not offend the dignity of the Assembly. In addition, whilst in the house legislators are protected from prosecution and civil actions by parliamentary immunity and consequently are expected to avoid using words or phrases that might be seen as abusing that immunity.

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(f) refer to alleged “sexual misconduct on the President’s part”.¹¹

In fact, most parliaments prohibit “unparliamentary language” but do not restrict members from giving their opinion regarding a certain matter under discussion. For example, the word “liar” is prohibited by most parliaments such as Australia, Canada, Britain, Northern Ireland, and Wales,¹² to mention a few. In Britain the following words have been regarded unparliamentary: blackguard, coward, git, guttersnipe, hooligan, ignoramus, liar, rat, swine, stoolpigeon, and traitor. Apparently, the word *shit* is not unparliamentary language when used as a noun to refer to faeces.¹³ In Canada the following words are prohibited from parliament: parliamentary pugilist, a bag of wind, inspired by forty-rod whiskey, coming into the world by accident, blatherskite, the political sewer pipe from Carleton County, lacking in intelligence, a dim-witted saboteur, liar, a trained seal, evil genius, Canadian Mussolini, pompous ass, fuddle duddle, pig, jerk, sleaze bag, racist, scuzzball, weathervane.¹⁴

Like other rules that have changed with the times, Speakers' rulings on unparliamentary language reflect the tastes of the period and the connotation of a particular word(s) used in a particular country. In UK it is said that it is a point of pride among some British MPs to be able to insult their opponents in the House without the use of unparliamentary language. Several MPs, notably Sir Winston Churchill, have been considered masters of this game. Some terms which have evaded the Speaker's rules are such as “terminological inexactitude” to mean a “lie;” another is “being economical with the truth” also to mean lying (it was used by Churchill). Ms Clare Short implicitly accused the Employment Minister Honourable Alan Clark of being drunk at the dispatch box shortly after her election in 1983, but avoided using the word “drunk,” saying that Honourable Clark was “incapable.” Honourable Clark's colleagues on the Conservative benches in turn accused Short of using unparliamentary language and the Speaker asked her to withdraw her accusation. Honourable Clark later admitted in his diaries that Honourable Short had been correct in her assessment.¹⁵

11 See: Unparliamentary Language at http://en.wikipedia.org/wiki/Unparliamentary_language (accessed 22 March 2008).

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

In December 2004 in Wales the Member of Assembly, Honourable Leanne Wood, refused to withdraw the remarks she made during a debate in the Parliament after the Queen's Speech. The incident occurred when the members were debating the implications of the UK government's proposals for Wales when Honourable Ms Wood attacked Labour Party on security issues. She said: "We are more at risk now than we have ever, ever been before and the measures outlined in Honourable Mrs Windsor's speech will not address this risk". The Presiding Officer Elis-Thomas J then told her to withdraw the remarks she had made on the grounds of discourtesy to the Queen. She refused, and was told to leave the Chamber for the rest of the day, in accordance with the Assembly Standing Orders. She left the Assembly accompanied by some other Members. When she was asked by the media she said that she was treated unfairly and the expulsion was unnecessary. She said, "It is consistent with the position that I have held for a very long time. Last time I boycotted her visit. "I don't think I was treated fairly, I don't think it was necessary". "I called her that [name] because that's her name".¹⁶ Honourable Ms Wood, who was elected as an Assembly Member (AM) for South Wales Central in 2003 was the first Assembly Members to be expelled since the Assembly began sitting in May 1999.¹⁷

The situation is not different in other Parliaments either. In Canada, politicians have been engaging in a piece of political theatre called "question period" since the country was born. It is a 45-minute period of time in the House of Commons when Members of Parliament engage in often rowdy debate and, sometimes, name-calling. Question period – 2:15pm. Eastern Time Monday to Thursday and 11:15am. Fridays – is designed to make sure the government is accountable to the people, so MPs get a chance to ask the government questions. The decorum of the House is maintained by the Speaker, but over the years its fractious nature has exploded, resulting in personal insults being flung across the floor.¹⁸

Before we proceed, it should be made clear that the above examples are given not for the purpose of encouraging other Parliaments to emulate but to show that the freedom of speech for members of parliament is not something that can easily be restricted. The Speaker's role is to manage the decorum but he should be very careful not to violate members' freedom of speech. If a member refuses to withdraw a particular word or words (not the whole

16 See: the BBC, *MP Expelled for Mrs. Windsor' Jibe*, at http://news.bbc.co.uk/2/hi/uk_news/wales/4060043.stm. (accessed 20 March 2008).

17 *Ibid.*

18 You can see this by visiting CBC News at: http://www.cbc.ca/news/background/cdn-government/political_insults.html (accessed 22 March 2008).

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statement) which may be regarded as unparliamentary language, what the Speaker does is only to order the MP to go out of the Parliament for that particular day but not to suspend him for his statement. This is where a clear difference can be seen when comparing it with Tanzania Parliament's Standing Orders for which a member can be suspended because of his remarks in Parliament. If a member says something which is undesirable (meaning unparliamentary) the proper course to take is to withdraw that particular word(s) but not his entire opinion on something.

4.1.2 Freedom of Speech as a Rule and Restrictions as Exceptions

A book written by Robert Marleau and Camila Montpetit on the House of Commons Procedure and Practice¹⁹ provides a very elaborate account of parliamentary business in Canada. The most important right accorded to Members of the House is the exercise of freedom of speech in parliamentary proceedings. It has been described as:

... a fundamental right without which, they would be hampered in the performance of their duties. It permits them to speak in the House without inhibition, to refer to any matter or express any opinion as they see fit, to say what they feel needs to be said in the furtherance of the national interest and the aspirations of their constituents.²⁰

Robert Marleau and Camila Montpetit noted that though this is often criticized the freedom of speech permits Members to speak freely in the Chamber during a sitting or in Committees during meetings even making allegations which the Member genuinely believes at the time to be true, or at least worthy investigation. They continue to observe that: "As in courts of justice, the House of Commons could not work effectively unless its Members were able to speak and criticize without having to account to any outside body. There would be no freedom of speech if everything [the Member says] had to be proven true before it were uttered."²¹ The former Speaker of the House of Commons in Canada, Honourable Speaker John Bosley,²² had been regarded as one of the defenders of the freedom of speech by members by

19 Robert Marleau and Camile Montpetit, *House of Commons Procedure and Practice*, Ottawa Canada, 2000.

20 The authors quoting from *Special Committee on the Rights and Immunities of Members, First Report*, presented to the House on 29 April 1977.

21 Robert Marleau and Camile Montpetit, *supra* note 19.

22 He is best known for having been Speaker of the Canadian House of Commons from 5 November 1984 to 29 September 1986.

affirming that, “the privilege of a Member of Parliament when speaking in the House or in Committee is absolute, and that it would be very difficult to find any statement made under the cloak of parliamentary privilege constituted a violation of that privilege.”²³ For example, on 7 December 1984, Honourable John Nunziata (York South-Weston) rose on a question of privilege to claim that comments made by Honourable Svend Robinson (Burnaby) in committee constituted a contempt of Parliament. Honourable Robinson had alleged United States Central Intelligence Agency penetration at senior management levels of Petro-Canada and had named several individuals as CIA agents.

In his ruling, Honourable Speaker Bosley noted that the statements made by Honourable Mr Robinson did not constitute contempt of Parliament in that no Member or official of the House had been obstructed or impeded in the discharge of his or her duty. On 21 December 1984, Honourable Robinson rose in the House to retract his remarks in the committee. He said that he had relied upon a confidential source of information and had availed himself of parliamentary immunity to accuse the Petro-Canada employees of spying for the CIA. He then went on to state: “While the tradition of parliamentary immunity is a long and important one, in retrospect I regret that I used my immunity to name these individuals. I have written to both men to express unreservedly my regret for having publicly named them ... As well, Mr Speaker, I wish at this time to issue a complete and unequivocal retraction of the allegations I made and unreservedly apologize to the two individuals involved ...”²⁴ Of course, this is how self respected members are supposed to do.

In UK, the House of Commons’ Procedures do emphasize the importance of free speech and the duty to members. The Procedures provide that free speech is the most important parliamentary privilege and members should be careful not to abuse it. The words of the Commons procedures Committee are to the effect that:

We reiterate that the privilege of freedom of speech is an essential protection for members in carrying out their duties. There is no point in this privilege unless it provides guarantees against attempts from outside to control what members choose to say in the House. However, privilege carries with it responsibilities as well as rights; and those responsibilities have to be exercised within the rules laid down by the House and in conformity with the standards it expects of its members. Irresponsible or reckless use of privilege can cause great harm to outside individuals

²³*Debates*, 11 December 1984, at 1114.

²⁴ See: Robert Marleau and Camile Montpetit *supra* note 19 at Chapter 3, “*Privileges and Immunities*” in its footnote 120.

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who enjoy no legal redress and, in some circumstances, could be prejudicial to the national interest. The strongest safeguard against so-called abuses is the self-discipline of individual members. This means, for instance, that a member should take steps, before making a potentially damaging accusation against a named individual, to ensure not only that evidence exists but that it comes from a normally reliable source. This does not imply that a member needs to have evidence that would satisfy a court, but that he should act on the basis of something firmer than mere rumour or supposition.²⁵

The above quoted paragraph is very important. Members of parliaments are required to be responsible and exercise due care in the words they are speaking. However, this is done through self-discipline mechanisms. The Speaker exercises control only where the limit is exceeded; when offensive or disorderly words are used, but not in the manner done by the Standing Orders of Tanzania's Parliament by requiring a member to prove what he has said. The privilege of freedom of speech is an extremely powerful immunity and the job of the Speakers is to frequently advise and caution Members about misuse. This privilege applies to Members' speech only in the House and other proceedings of the house itself, but may not apply to reports of proceedings or debates published by newspapers or others outside Parliament.²⁶ Parliamentary privilege may not protect a member publishing his or her own speech separate from the official record.²⁷ Members are therefore cautioned that utterances which are absolutely privileged when made within the four walls of the Chamber in the exercise of the parliamentary mandate may not be when repeated in another context. Nevertheless, those remarks made in the forum of Parliament must also be carefully uttered.

In order to address the feeling of injustice that inevitably arises when an ordinary citizen is negatively affected by the statement made in parliament, since he cannot seek redress for a defamatory statement, some parliaments have devised a mechanism of reply or rebuttal.²⁸ In order to ensure fairness of the process, the Parliaments of Australia, New Zealand, and of New South Wales, for example, allow a right of reply for individuals who feel offended by

25 The United Kingdom *Parliament, Parliamentary Privilege –First Report*; *supra* note 50 at Chapter 4, paragraph 224.

26 See: Enid Campbell, *Commonwealth Powers and the Privileges of State Parliaments*, *supra* note 7 of Chapter 2.

27 For more explanation on this please see, *Parliamentary Privilege in Canada*, (2 ed) Maingot, at 44-6, 50-9. Ottawa: House of Commons and McGill-Queen's University Press, 1997.

28 See: this practice is explained in Richard Best, *Freedom of Speech in Parliament: Constitutional Safeguard or Sword of Oppression?* 24 Victoria U Wellington L. REV. 91 (1994).

remarks made about them during a parliamentary debate.²⁹ They may request to the Speaker that they be allowed to respond to the allegation and that response be incorporated in the *Hansard* transcripts.³⁰

On the duty of members to be careful with their statement, Honourable Speaker John Fraser (1986–1994) of the Canadian House of Commons had occasion to urge Members to take the greatest care in framing their questions and remarks. In a ruling following a question of privilege³¹ he spoke at length about the importance of freedom of speech and the need for care in what Members said. He stated:

There are only two kinds of institutions in this land to which this awesome and far-reaching privilege [of freedom of speech] extends — Parliament and the legislatures on the one hand and the courts on the other. These institutions enjoy the protection of absolute privilege because of the overriding need to ensure that the truth can be told, that any questions can be asked, and that debate can be free and uninhibited. Absolute privilege ensures that those performing their legitimate functions in these vital institutions of Government shall not be exposed to the possibility of legal action. This is necessary in the national interest and has been considered necessary under our democratic system for hundreds of years. It allows our judicial system and our parliamentary system to operate free of any hindrance.

Such a privilege confers grave responsibilities on those who are protected by it. By that I mean specifically the Honourable Members of this place. The consequences of its abuse can be terrible. Innocent people could be slandered with no redress available to them. Reputations could be destroyed on the basis of false rumour. All Honourable Members are conscious of the care they must exercise in availing themselves of their absolute privilege of freedom of speech. That is why there are long-standing practices and traditions observed in this House to counter the potential for abuse.³²

On 27 September 1994, Honourable Svend Robinson (Burnaby–Kingsway) raised a point of order concerning remarks made by Honourable Roseanne Skoke (Central Nova) during second reading debate on Bill C-41 (Criminal Code Amendment (sentencing)) on 20 September 1994. Speaker

29 *Ibid* at 100.

30 See: also UNDP, *Parliamentary Immunity*, Background Paper prepared by the Inter-Parliamentary Union, *supra* note 17 at 9 of Chapter 2.

31 On 14 April 1987, Otto Jelinek (Minister of State for Fitness and Amateur Sport) raised a question of privilege regarding oral questions asked about an alleged conflict of interest involving himself. Speaker Fraser ruled that the Minister's capacity to function as a Minister and a Member was not impaired. See: *Debates*, 14 April 1987, pages 5124–34; 5 May 1987, pages 5765–6.

32 *Debates*, 5 May 1987, pages 5765–6; quoted from Robert Marleau and Camile Montpetit *supra* note 19 at 6.

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Parent gave his ruling on 30 September, stating that although he realized that there existed a profound difference of opinion between the two Members, he acknowledged that the remarks made by Honourable Ms Skoke were within the context of debate and not directed at any particular Member. In his ruling following a point of order the Speaker also emphasized the need for Members to use great care in exercising their rights to speak freely in the House. He said,

“... paramount to our political and parliamentary systems is the principle of freedom of speech, a member’s right to stand in this House unhindered to speak his or her mind. However, when debate in the House centers on sensitive issues, as it often does, I would expect that members would always bear in mind the possible effects of their statements and hence be prudent in their tone and choice of words.”³³

In Canada, it is only where it is very necessary that a Speaker can use his power contained under Standing Orders 10 and 11 for the purpose of preserving order and decorum. Under pressing situation the Speaker would order a Member to resume his or her seat if engaged in irrelevance or repetition in debate, or to name a Member for disregarding the authority of the Chair and order him or her to withdraw from the House.³⁴ If the situation is not pressing the common denominator has been like what was stated by Speaker Gilbert Parent in 1998; when he said: “Regardless of how dramatically our opinions may diverge or how passionately we hold to convictions that our political opponents do not share, civility must be respected in the House of Commons. This means that each member is entitled to speak and each member can expect a fair hearing, whether or not we agree with what they say or what they stand for.”³⁵ It is said that one of the basic principles of parliamentary procedure is that proceedings in the House should be conducted in terms of a free and civil discourse. In order that debate on matters of public policy is held in a civil manner, the House has adopted rules of order and decorum for the conduct of Members towards each other and towards the institution as a whole. Members are to show respect for one another and for different viewpoints; offensive or rude behaviour or language

33 *Ibid* Robert Marleau at 7.

34 John Turner, the leader of the Opposition in the Canadian House of Commons in 1986 prayed to the Speaker that “You know what we demand of you, Mr Speaker. Perfection! We want fairness, independence, decisiveness, patience, common sense, good humour, upholding the traditions of the House, knowledge of the rules and an intuition for the changing mood and tone of the House as we move through our days.” (*Debates*, 30 September 1986, page 9).

35 *Debates*, 16 March 1998, page 4902.

is not tolerated. Emotions are to be expressed in words rather than acted out; opinions are to be expressed with civility and freely, without fear of punishment or reprisal.³⁶

Some Parliaments inscribe in their Standing Orders that, members of parliament shall maintain the dignity and image (decorum) of Parliament both during the sittings in Parliament and in their acts and activities outside Parliament. If it appears in the proceedings of Parliament that a statement made by a member is considered seriously defamatory of any person the presiding officer shall refer the matter to the Committee of Privilege. If the Committee after inquiry finds that the statement was defamatory, it may make recommendations for disciplinary measures to be taken.³⁷

On 30 July 1997 the UK House of Commons ordered that a Select Committee of seven Members be appointed to join with a Committee to be appointed by the House of Lords, as the Joint Committee on Parliamentary Privilege, to review “Parliamentary Privileges,” and make recommendations thereon. The Committee was appointed and it came up with a detailed report. Both the House of Lords and the House of Commons ordered the report to be published and printed on 30 March 1999.³⁸ This report makes many recommendations in order to improve the parliamentary privileges. Among the recommendations include, “procedural fairness” when some disciplinary actions are taken against a Member who is alleged to have committed contempts of Parliament.³⁹ The Joint Committee noted that contempt is a serious matter. A finding of contempt of either House against a member may have adverse consequences of a high order, particularly when it relates to the member's personal conduct. In a particularly serious case a member of the House of Commons faces the prospect of suspension and significant financial

36 See: “Rules of Order and Decorum”, at <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch13&Seq=1&Lang=E> (accessed 22 March 2008).

37 See: for example, the Constitution of Sierra Leone articles 97 and 99.

38 See: the UK Parliament, *Parliamentary Privilege -First Report*, 1999 *supra* note 50 of Chapter 2. The Report is made part of Publications and Records of both Houses. It can be accessed at <http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm> (accessed by the author 4 through 22 March 2008).

39 As it can be observed, every House has the power to deal with its member under disciplinary mechanism when he commits contempt. The difference is what particular offence is regarded as contempt of parliament which will require a disciplinary procedure to be invoked. Most parliaments observed here in this work do not have a similar system like Tanzania where a member can be dealt with even for statements he made in the parliament because that will amount into breaching of parliamentary privilege. But they can deal with a member if he commits a serious offence defined in their law, e.g., receiving bribes to ask questions, committing criminal offences, seriously defaming another member or any person without apology etc.

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loss and, which may be more worrying for him, the destruction of his political career. Even when a member is not suspended, the electorate may react adversely to his conduct as revealed during investigation of a complaint made against him. The Committee recommended that, it is important, therefore, that the procedures followed in the investigation and adjudication of complaints should match contemporary standards of fairness.⁴⁰ The Committee recommended the following:

281. While fairness is fundamental to any disciplinary procedure, the more serious the consequences, the more extensive must be the safeguards if the procedure is to be fair. Some allegations of contempt are more serious than others. In dealing with especially serious cases, we consider it is essential that committees of both Houses should follow procedures providing safeguards at least as rigorous as those applied in the courts and professional disciplinary bodies. At this level the minimum requirements of fairness are for the member who is accused to be given:

- (a) a prompt and clear statement of the precise allegations against the member;
- (b) adequate opportunity to take legal advice and have legal assistance throughout;
- (c) the opportunity to be heard in person;
- (d) the opportunity to call relevant witnesses at the appropriate time;
- (e) the opportunity to examine other witnesses;
- (f) the opportunity to attend meetings at which evidence is given, and to receive transcripts of evidence.

In determining a member's guilt or innocence, the criterion applied at all stages should be at least that the allegation is proved on the balance of probabilities. In the case of more serious charges, a higher standard of proof may be appropriate.⁴¹

These recommendations follow very closely the standards of the 1988 Australian Senate Privilege Resolution which confers special rights on persons accused of contempts of the Senate. In Australia, cases of alleged contempts are heard by the Committee of Privileges, and all persons appearing before the committee have the right to be informed of any specific allegations against them, to respond to such allegations, to be represented by counsel, to call

⁴⁰ The UK Parliament Report, *supra* note 50 at paragraph 280 of Chapter 2.

⁴¹ *Ibid* paragraph 281.

witnesses, to cross-examine other witnesses, and to make final submissions to the committee.⁴²

4.2 THE JUDICIAL POWER OF REVIEW

The crucial question whether the courts of law can examine or review the exercise of parliamentary privileges has been controversial. The controversy arises from the mother of parliamentary privilege provision in the Westminster model in the Commonwealth community of nations. As we have already observed, the principle of parliamentary immunity and privileges owes its origin from the British *Bill of Rights* of 1689. Article 9 of the *Bill of Rights* states that “the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.” This provision which is replicated in most Commonwealth countries for the purpose of providing their parliaments with immunity and privileges have been misunderstood or over understood. The provision is broad than what is just meeting the eyes. We shall examine case law from various jurisdictions to see whether or not this provision simply shuts the door of courts of law.

In a Tanzanian case of *Augustine Lyatonga Mrema v Speaker of the National Assembly*⁴³ the High Court Judge dismissed an application that was filed by the applicant who was a Member of Parliament, challenging the decision of the Parliament to suspend him from the Assembly. In invoking Article 100(1) of the Tanzania Constitution which is identical to Article 9 of the British Bill of Rights, the Judge upheld the suspension of the MP by holding that: “And in obedience to Article 100(1) of the Constitution, I hereby declare that this court has no jurisdiction to hear this petition, and therefore the application is unmaintainable. I shall not by illegal force break into the parliamentary caste.” The assumption here was that what has transpired in Parliament in the exercise of its Parliamentary Standing Orders cannot be inquired or questioned into by a court of law. Those who hold this view start their argument from the old English case of 1884 in *Bradlaugh v Gosset*⁴⁴ where Coleridge LJ stated, *inter alia*, that:

What is said, or done, within the walls of Parliament, cannot be inquired into by a court of law. On this point all the judges in the two great cases which exhaust the learning on the subject, namely *Burdet v Abbot*, and *Stockdale v Hansard* are agreed and are emphatic. The jurisdiction of the House over their own members, and their

42 See: Parliament of Australia, SENATE, Senate Brief number 11 September 2006.

43 Miscellaneous Civil Application number 36 of 1998.

44 (1884) 12 QBD 271.

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right to impose discipline within their walls, is absolute and exclusive. They would sink into utter contempt and inefficiency without it.⁴⁵

The interpretation of this decision is sometimes misunderstood. The court did not mean that whatever is being done by the Parliament should not be questioned by the Court even where the member's privilege or right has been violated by the same Parliament.⁴⁶ What the Court meant in this case is that the courts of law cannot question whether the Parliament has the power to impose disciplinary penalty against its members, since this power is within the exclusive jurisdiction of the Parliament. In other words, neither the Parliament nor its members ought to be accountable in court for what they say or do in the course of proceedings in Parliament. But this does not preclude the courts from examining, among other things, whether the imposition of punishment to a member or non-member was legal in the sense that the legal requirements which have been put in place by the Constitution or other laws of the land,⁴⁷ including whether the Parliamentary Standing Orders, have been followed. One of the judges, Douglas J in *Barnes v Purcell*,⁴⁸ explained that the reason why the Court might examine the House's interpretation was that a question of punishment was involved. His view was that "it is not within the exclusive power of Parliament to determine such punishment by its own construction of standing orders. The Courts in Australia and the Privy Council have construed standing orders to ascertain what power the House of Parliament has to inflict punishment, and it follows that if they can examine the power to punish they must have power to examine the extent of such punishment."⁴⁹

In public constitutional law this power of the court is called judicial review. Judicial review is the power of the court to review the actions of public bodies, whether executive or legislature, in terms of their legality or constitutionality.⁵⁰ In many jurisdictions which have the written constitution

45 Quoted also by Pius Msekwa, *Parliamentary Privilege in Tanzania*, *supra* note 13 at 18 of Chapter 2.

46 See: a detailed discussion of *Gosset* case and other cases in Enid Campbell, *Expulsion of Members of Parliament* *supra* note 8 at 34-43 of Chapter 2.

47 See: also Queensland Supreme Court decision in *Barnes v Purcell* [1946] QSR 87 found in Enid Campbell *supra* note 8 at 35 of Chapter 2.

48 *Ibid.*

49 *Ibid* at 103.

50 For an elaborate discussion of Judicial Review please read, among other books, Brian L Jones, and Katherine Thompson, *Garner's Administrative Law*, 2005; HWR Wade, *Administrative Law*, Oxford, 1982; Bernard Schwartz and HWR Wade, *Legal Control of Government: Administrative Law in Britain and the United States*, 1972; John Arthur, *Words that Bind: Judicial Review and The Grounds of Modern*

like Tanzania, India, US and many others it is also possible to review the constitutionality of the law itself which empowers a public body to have the power it exercises. In this context, when someone tries to use the English decisions as precedents, particularly on matters touching the Constitution, he must be very careful in trading with them since the constitutional arrangements or set up might be different. The British have no written constitution, and courts generally do not have the power to declare legislation as unconstitutional. It is, therefore, important to examine a specific country's legal and constitutional powers of the courts to be able to determine the value of precedent arising from constitutional interpretation.

However, even in the UK the situation has changed radically from the very old dogma that courts of law cannot question any law passed by the legislature as it was believed that the UK Parliament is sovereign or supreme. Unlike some other jurisdictions with written constitutions, English law does not know judicial review of primary legislation (laws passed by Parliament),⁵¹ save in limited circumstances where primary legislation is contrary to EU law (see *Factortame* case).⁵² In this case the European Court of Justice ruled that UK courts could have powers to overturn UK legislation contravening EU law which the UK courts failed to do so. In the same context, although the UK Courts can review primary legislation to determine its compatibility with the Human Rights Act 1998, they have no power to quash or suspend the operation of an enactment which is found to be incompatible with the European Convention of Human Rights – they can merely declare that they have found the enactment to be incompatible.

With regard to the scope of Article 9 of the British *Bill of Rights* the Joint Committee of both the House of Commons and House of Lords had an opportunity to reflect it in their report.⁵³ The Committee noted that over the years this article has been the subject of many legal decisions. Even so, the Committee noted, uncertainty remains on two basic points: what is covered

Constitutional Theory, 1995.

- 51 In theory, supreme legislative power is vested in the Queen-in-Parliament; in practice in modern times, real power is vested in the House of Commons; the Sovereign generally acts on the advice of the Prime Minister and the powers of the House of Lords are limited.
- 52 The *Factortame* case is a landmark decision in United Kingdom (UK) and European Union (EU) law, which confirmed the supremacy of European Union law over national law in the areas where the EU has competence. The decision, which formed part of a lengthy litigation battle comprising numerous judgments spread over a period of more than ten years, raised a number of issues which are of particular constitutional significance in the debate in the UK over the erosion of parliamentary sovereignty or supremacy. The case arose from the House of Lords decision in *R v Secretary of State for Transport, ex parte Factortame and others (Factortame III)* [1993] 3 CMLR. 597; (HL)
- 53 See: the UK Parliament, *Parliamentary Privilege -First Report*, *supra* note 50 of Chapter 2.

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by “proceedings in Parliament,” and what is meant by “ought not to be impeached or questioned in any court or place out of Parliament.” A definitive history of the origins of Article 9 has yet to be written but one thing is reasonably clear, the Committee remarked, “the principal purpose was to affirm the House's right to initiate business of its own and to protect members from being brought before the courts by the Crown and accused of seditious libel.” Article 9 also reasserted the long established claim not to be answerable before any court for words spoken in Parliament. The modern interpretation is now well established: “that Article 9 and the constitutional principle it encapsulates protect members of both Houses from being subjected to any penalty, civil or criminal, in any court or tribunal for what they have said in the course of proceedings in Parliament.”⁵⁴

However, the Committee noted that whenever the issue of parliamentary privilege is established it is the Court not the Parliament that should decide. To cut the long story short we quote the relevant part extensively:

The centerpiece of the privileges of the House is of course freedom of speech, without which it would not be possible for the House or its Members to perform their functions. Freedom of speech is one of the freedoms sought by the Speaker from Her Majesty in the name of the Commons at the beginning of a Parliament. It is also however protected by statute which is set out in Article IX of the Bill of Rights 1689: “freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”.

Whenever problems arise in connection with freedom of speech therefore, it is usually the courts and not the House which resolve them. The consequence is that the practical scope of this most vital privilege is not within the control of the House. It cannot even be as the Court of Appeal in New Zealand (where Article IX is also law) thought “waived” or not insisted on by any House. It is an obligation laid not on the House but on the courts ...

The courts are aware that mutuality of respect is an important part of the relationship. It was said in 1985 in *R v HM Treasury ex parte Smedley* [1985] QB 657 at 666) that:

It ... behoves the courts to be ever sensitive to the paramount need to refrain from trespassing on the province of Parliament or, so far as this can be avoided, even appearing to do so...I would hope and expect that Parliament would be similarly sensitive to the need to refrain from trespassing on the province of the courts.

⁵⁴ See: e.g. *Eliot's case* (1629) 3 St.Tr. 294; and *Pepper v Hart* [1993] AC 593.

[But] one might also note the observations of a judge in 1990 (*Rost v Edwards* 2 QB 460 at 478) to the effect that:

While giving full attention to the necessity for comity between the courts and Parliament, [a court] should not be astute for ousting its own jurisdiction, and for limiting or even defeating a litigant's proper claim ...

The Supreme Court of Canada in the case of *Canada (House of Commons) v Vaid*⁵⁵ had also discussed the extent to which the House of Commons' privileges can be defined when a dispute is brought to the Court. The Court observed that it is a wise principle that the courts and Parliament strive to respect each other's role in the conduct of public affairs. Parliament, for its part, refrains from commenting on matters before the courts under the *sub judice* rule. The Courts, for their part, are careful not to interfere with the workings of Parliament.⁵⁶ The Court continued to reason that, "the contours of parliamentary privilege, and the relationship between Parliament and the Courts relative to its exercise, have been dealt with by this Court in a number of cases, most recently in connection with the 'inherent' privileges of provincial legislative assemblies in *New Brunswick Broadcasting* and *Harvey v New Brunswick (Attorney General)*".⁵⁷ Later on the Court stated, *inter alia*, that:

The role of the Courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege (*Re Ouellet (number 1)* (1976), 67 DLR (3d) 73 (Que. Sup. Ct.), at page 87). Thus in 1839, almost three decades before Confederation in Canada, the English courts rejected the authority of a formal resolution of the House of Commons that the Court believed overstated the true limits of the privilege claimed (*Stockdale v Hansard*, at page 1156, *per* Denman CJ; page 1177, *per* Littledale J; page 1192, *per* Patterson J; page 1194, *per* Coleridge J). The jurisdiction of the courts in adjudicating claims of privilege has since been accepted by authorities on British Parliamentary Practice (see *Erskine May*, at pages 185–86). The same division of jurisdiction between the Courts and the House was accepted by this Court in *Landers v Woodworth* (1878), 2 SCR 158, where Richards CJ, our first Chief Justice, had this to say at page 196:

"[T]he courts will see whether what the House of Commons declares to be its privileges really are so, the mere affirmance by that body that a certain act is a breach of their privileges will not oust the courts from enquiring and deciding whether the privilege claimed really exists."

55 [2005] 1 SCR 667, 2005 SCC 30.

56 *Ibid* paragraph 20.

57 [1996] 2 SCR 876.

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This is how the courts of law, even in Tanzania, are required to examine the provisions of Article 100(1) of the Tanzania Constitution without even regarding to the constitutionality of Standing Orders themselves. When they are doing so, they are not questioning the power of the Parliament but they are reviewing to see whether the Parliament exercised its powers in accordance with the law. The issue is not whether the Parliament has power to impose punishment to its members but whether the exercise is legally correct, and (sometimes) whether the law used is legal (constitutional).

The recent Supreme Court of India in a 2007 ruling on the *Jharkhand Mukti Morcha MPs (JMM) Bribery* case has had to grapple with the same challenge. The Court's judgment upholding the right of Parliament to expel eleven Members of the Lok Sabha (India Parliament) found guilty of misconduct was notable for the constitutional balance it strikes, by combining judicial restraint and respect for the powers of the legislative body even while according with public sentiment. After the tendency of some Members of Parliament to accept money for asking questions in the House was exposed by the broadcast media in a sting operation, the Speaker and Parliament acted with commendable dispatch in instituting an enquiry and hearing and, on finding them guilty, expelling them.⁵⁸

The swift action helped to counter public distrust and restore some measure of credibility of representative institutions. The expulsions, however, were challenged in Court mainly on the grounds that the Parliament did not have the power to expel members and that the procedure adopted for the enquiry was hurried and flawed. The Supreme Court held categorically that Parliament does have the power of expulsion and that there was nothing wrong in the procedure as well. What is important for our discussion here is that the Supreme Court held that the Parliament's exercise of its privileges in expelling its members for misconduct is subject to judicial review. Enid Campbell also notes that in determining whether the parliament power to expel members had been exercised for an improper purpose, the New South Wales Supreme Court exercised supervisory jurisdiction akin to that it would exercise in relation to the exercise of discretionary powers vested in administrative bodies. Decisions of such bodies in purported exercise of discretionary power may be held void on the ground that the power in question was exercised for an improper purpose or in bad faith, in excess of

58 See: *The Hindu*, Online edition of India's Newspaper, *A Commendable Balance*, Friday, 12 January 2007. Available at <http://www.hinduonnet.com/2007/01/12/stories/2007011203011000.htm> (accessed 23 March 2008).

jurisdiction or generally illegally.⁵⁹

The Court in India ruled that, judicial review can be exercised to such grounds as “lack of jurisdiction or it being a nullity for some reason such as gross illegality, irrationality, violation of the constitutional mandate, *mala fides*, non-compliance with rules of natural justice and perversity.”⁶⁰ This decision has been commended for the reasons that it strikes a balance between the Courts and Parliament. It was argued that the Parliament derives its powers only from the Constitution of which the Judiciary is the custodian. In a parliamentary form of government, the legislature and the executive work in close coordination. So there is every possibility of the legislature becoming despotic based on the principle of majority rule. Judicial review, therefore, should be viewed as one of the fundamental rights of all citizens.⁶¹

In Tanzania, the power of the courts in this respect is even fortified by two major constitutional provisions. The first is Article 101 which requires the Parliament to enact a law which empowers the courts to enforce the freedom of speech and debate in Parliament. The Parliament enacted that law – The Parliamentary Immunities, Powers, and Privileges Act, 1988 particularly section 3. Another provision is Article 107A;⁶² which states, *inter alia*, that “The organ which has the final say in the dispensation of justice in the United Republic shall be the Judiciary.” Apparently, the logical interpretation which flows from these provisions is that where a litigant is aggrieved by anybody, even if it is the Executive body or the Legislative body, the organ which has the final authority to say whether justice has been done or not is the courts of law.

Arguably, the courts can even stretch its powers further by examining whether the law which restricts the freedom of speech is in consonant with the Constitution. Any restriction or prohibition to a right and freedom must be reasonable taking into account the circumstances of each case. We should remind ourselves the judicial tests of legality and proportionality⁶³ that have been invoked several times by the courts, and which we examined fully in Chapter one. In a nutshell, for any restriction to be lawful the following criteria have to be established: (i) whether the restriction is provided for clearly by the law; (ii) whether that restriction has a legitimate purpose; and

59 Enid Campbell, *Expulsion of Member of Parliament*, *supra* note 8 at 37, 39 of Chapter 2.

60 See: *The Hindu*, Online edition of India's Newspaper, *supra* note 58.

61 *Ibid.*

62 It was brought into the Constitution in 2000 vide Act number 3 of 2000.

63 See: Human Rights Committee's Views in *Nicholas Toonen v Australia*, Communication number 488 of 1992 paragraph 8.3.

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(iii) whether the restriction is necessary in a democratic society.

Parliaments all over the world have disciplinary powers; but most parliaments which take due regards to the freedom of parliamentary members will use that power sparingly. In most occasions the penalties of suspension or expulsion from Parliament will be used in very serious offences which usually do not relate to speech in Parliament. For example, in UK although both Houses have power to imprison for some serious offences, neither House has used the power in recent times in respect of members or non-members for any offence.⁶⁴ The House of Commons punishes members found guilty of a serious contempt by suspension or admonishment or both. It has also the power of expulsion. But expulsion has not been used for half a century now. The last time a member was expelled, following a criminal conviction and sentence of imprisonment by a court for twelve months, was in 1947.⁶⁵

The British Parliament's House of Commons on 23 July 2007 suspended a lawmaker accused of concealing his financial dealings with the then Iraq-Saddam Hussein's government. Honourable George Galloway, an MP from Labour Party and known for his fierce opposition to Britain's role in the invasion of Iraq, was suspended for 18 days, following an investigation which found that a charity he set up was partly funded by the Iraqi dictator.⁶⁶ The decision, which came without a vote, followed a recommendation from a parliamentary disciplinary panel that investigated the charity. Honourable Galloway accused his opponents of hypocrisy. He said, "None of the parties here, and all three of them are culpable, ever asked the millionaires and billionaires who gave them and lent them money where they got the money from." Honourable Galloway was ordered to leave the legislature after the House Speaker, Honourable Michael Martin, complained he was abusing the good character of its members. Honourable Galloway vowed to continue his speech outside the Parliament for anyone who wanted to hear it.⁶⁷

Before this saga, in 2003 Galloway was suspended from his Labour Party after the remarks he made at the height of the Iraq War when he branded Tony Blair a "wolf" and made comments seen as urging Arabs to rise up

64 See: UK Parliament, *Parliamentary Privilege- First Report*; *supra* note 50 at paragraph 276 of Chapter 2.

65 *Ibid*

66 See: ABC News, Monday 23 July 2007, *Galloway Suspended from the UK Parliament*. Available at <http://abcnews.go.com/International/wireStory?id=3406205> (accessed 23 March 2008).

67 *Ibid*.

against the British Army and coalition forces in Iraq.⁶⁸ When he was asked to comment on his suspension he described it as “completely unjust” and “prejudicial”. He asked rhetorically – “Is that what free speech and parliamentary democracy is going to be in the new Blair era?”⁶⁹

The most important aspect of parliamentary privilege as far as it relates to parliament as an institution, is its ability to determine its own rules and to enforce them by means of disciplinary sanctions which may comprise suspension and even expulsion. However, in the exercise of enforcing its rules the Parliament must be very careful to avoid overstepping on the rights and freedom of its members and impose excessive punishments.

For instance, while in the twentieth century, cases of parliaments imposing sentences are extremely rare, the power still exists and the Parliament of Zimbabwe in 2004 used it when it sentenced a member from opposition to imprisonment with hard labour. The ruling party, ZANU-PF, parliamentarians used their majority in the House to impose a one-year jail term of hard labour against opposition legislator Honourable Roy Bennett.⁷⁰ As noted by ZimOnline, that made Honourable Bennett the first Zimbabwean to be sentenced outside the court process, and the country’s first Member of Parliament to ever be jailed over alleged contempt of parliament charges.

Honourable Bennett was alleged to have shoved Justice Minister Honourable Patrick Chinamasa during parliamentary debate in May 2004, after the latter had referred to his ancestors as “murderers” and “thieves” who stole Zimbabwe’s land from the blacks.⁷¹ The matter was referred to the Privilege Committee and its recommendation was voted on by the House plenary along party lines. No appeal procedure was available to the MP concerned.⁷² This decision was condemned widely. The Inter-Parliamentary Union (IPU) condemned it too and held that, in countries where parliaments has retained the power to sit as a court, the internationally recognized fair trial guarantees must be applied, in particular the right of appeal to a court of law

68 See BBC News, Tuesday 6 May 2003, *Labour Suspends Galloway*. Available at http://news.bbc.co.uk/1/low/uk_politics/3003825.stm (accessed 5 February 2008).

69 *Ibid.*

70 See: Judi McLeod, *Democracy Under Arrest In Zimbabwe*, Canada Free Press, 3 November 2004. You can access it at http://www.zimbabwesituation.com/nov4_2004.html (accessed by the author 20 March 2008).

71 *Ibid.*

72 See: also UNDP, *Parliamentary Immunity* *supra* note 17 at 12 of Chapter 2.

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must be given.⁷³

The rationale for a right to appeal or judicial review is for avoidance of doubt that the decision was proper and it also gives an opportunity for the correction of any mistakes committed by the organ at first instance. It has also been suggested that the guarantee to have access to the court should be necessary because it is questionable whether the Parliament can be considered as an independent and impartial tribunal as required under article 14 of the International Covenant on Civil and Political Rights (ICCPR).⁷⁴

73 Resolution of the IPU Governing Council on the case of *Mr Roy Bennett and others*, October 2004.

74 UNDP, Parliamentary Immunity, *supra* note 17 at 12 of Chapter 2.

JUSTIFICATION AND CONCLUSION

5.1 JUSTIFICATION FOR THE FREEDOM OF SPEECH FOR MEMBERS OF PARLIAMENT

The desire to protect the freedom of speech to those chosen to speak on behalf of the people, the Members of Parliament, cannot be overemphasized. It is crystal clear that if individual persons are guaranteed with the freedom of opinion and expression both by international laws and domestic laws then such freedom is even more important to Parliament Members than individual persons. By the same reasoning, even if a government is preventing people from speaking their mind and criticize the government, such freedom should be afforded to members of parliament. This freedom is essential for the effective working of the House. Under it, members are able to make statements or allegations about outside bodies or persons or the government, which they may hesitate to make without the protection of privilege.¹

Freedom of speech is important because one cannot represent the opinion and doubts of his electorates without freedom of speech. Speech limitations on our representatives would mean certain issues facing the nation would be covered up or never mentioned. And this would cut off the possibility of both informed decisions on vital issues and well-executed actions to address these issues.² The legitimate purpose of freedom of speech coupled with immunity is to allow legislators to freely express themselves and adopt policy positions without fear of politically motivated retribution. If this was not the case a “powerful executive, with the backing of a majority in parliament, may violate the spirit of immunity altogether in order to silence opposition members publicizing government corruption.”³

The USAID has noted that in countries with strong executive (as in Armenia and Ukraine in the recent past), prosecutors are under political pressure to go after members of parliament who oppose the government (for both real and invented reasons), and ignore charges of corruption by

1 Robert Marleau and Camille Montpetit, *supra* note 19 at 4 of Chapter 43 “Privileges and Immunities”.

2 Mustafa Erdogan, *Parliamentary Immunity*, 29 November 2007. Available at <http://www.turkishpress.com/news.asp?id+204512> (accessed 26 February 2008).

3 United States Agency International Development (USAID), *Parliamentary Immunity Brief: A Summary of Case Studies of Armenia, Ukraine and Guatemala*, at 5 August 2006.

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government officials or members of parliament from the ruling party.⁴ It emphasized that freedom of speech for members of parliament and attendant immunity system offer important protections for members of opposition parties in democratizing societies. The abuse of these protections threatens the integrity of these nascent democratic parliaments and imperils the very process of democratization.⁵

The Global Organisation of Parliamentarians Against Corruption (GOPAC)⁶ Is pioneering, among other things, the freedom of speech for members of parliaments with a view to revealing corruption. Its peer support statement is: “Every organization needs to support its members and that is especially important for GOPAC and its regional chapters. In some parts of the world, legislators are in fear of their lives if they speak out against corruption. They need to know that they do not stand alone, there are legislators who are prepared to speak out with them and there is strength in numbers.” In its second Global Conference which was held in Arusha, Tanzania on 23 September 2006, GOPAC proclaimed three important resolutions: Parliamentary Immunity; Oversight; and Codes of Conduct for Parliamentarians.⁷

These documents reiterate the following principles: that freedom of speech and vote are essential rights and duties of parliamentarians in democratic societies; that Parliamentary Immunity is essential to effective parliamentary independence, but a system of parliamentary immunity that hinders the legitimate prosecution of criminal actions may offer protection for corrupt parliamentarians who may misuse their membership in parliament for personal gain; that Parliaments should adopt functional systems of parliamentary immunity that provide protection from unwarranted and politically motivated prosecutions but also ensure that parliamentarians are held accountable before the law; that there is a need for parliamentarians to demonstrate high standards of conduct to maintain a positive image; that parliamentarians must play a vital role in holding the executive branch

4 *Ibid* at 4.

5 *Ibid* at 4.

6 Incorporated under Canadian law as a not-for-profit organization, GOPAC is guided by a global Board of Directors selected by regional chapters. The Board’s Executive Committee is chaired by John Williams, Member of Parliament, Canada. Musikari Kombo (MP, Kenya) and Dr Naser Al-Sane (MP, Kuwait) are its Vice Chairs at the moment.

7 GOPAC, 2nd Global Conference, Arusha Tanzania, Available at http://www.gopacnetwork.org/programming_codes_en.htm (accessed 5 February 2008).

accountable and nurturing public confidence in democracy and its systems.⁸ Much can be said concerning the importance of freedom of speech to members of parliament which should not unreasonably be restricted; but the above justifications are enough to drive home the point.

5.2 CONCLUDING REMARKS

We can therefore sum up by holding that freedom of speech is crucial in any democracy, because open discussions of members are essential for voters to make informed decisions during elections. It is through speech that people can influence their governments' choice of policies. Also, it is through speech that public officials are forced to reveal what would not have otherwise been revealed and thus makes them accountable. It is through criticisms that the government can effect changes which will pave way for development and common good of all citizens. In this context, the government must be tolerant to any criticism leveled against it. If members of parliament or even individual persons are refrained from voicing their discontent because they fear retribution, the government can no longer be responsible to them. A government which does not accept criticism and thus suppresses freedom of expression whether of individuals or of members of parliament is doing so to avoid accountability. This is not desirable in a democratic government. As Lord Keith puts it, "It is of highest public importance that a democratically elected government body, or indeed any governmental body, to be open to inhibited public criticism".⁹ Any law which stands on the way to block members of parliament to utter their grievances and the concerns of people in general, for their general welfare, does not do justice to the people. To paraphrase the wording of the Inter-American Court of Human Rights, and modify them, it can be argued that, those members of Parliament to whom the privilege to speak freely applies, not only have such freedom and privileges to express their own thoughts, but also the right and freedom to impart information and ideas to the general public. For the public it is just as important to know the opinion of their representatives or to have access to information generally as is the very right to impart its own opinion. The reasoning is that a society that is not well informed is not a society that is truly free.¹⁰

8 *Ibid* For more information on GOPAC please visit its website at http://www.parlcent.ca/index_e.php (accessed 21 March 2008).

9 *Derbyshire CC v Times Newspapers Ltd*, *supra* note 105 of Chapter 1.

10 See: the Inter-American Court of Human Rights in its *Advisory Opinion* case, *supra* note 83 of Chapter 1.

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Of course, the Parliaments all around the world possess disciplinary powers, but that power is used sparingly for most serious offences and not for misconducts arising from speeches in parliaments, since these can be dealt with by the Speaker himself by requiring a concerned member to avoid uttering unparliamentary languages.

Finally, courts of law should know that there is no legal impediment which prevents them from reviewing acts or decisions of the parliament. Courts of law are a temple of justice. Any person who feels that his right or freedom or legal privilege has been violated should have recourse to the courts of law. Most international instruments require that there should always be recourse to judicial remedy even if there are other available administrative, legislative or quasi judicial remedies.¹¹

However, for members of parliaments who are given absolute privileges to speak and debate anything without hindrance for the interest of the general public, they are required to use that freedom responsibly because there is no 'guards to guard the guardians,' to paraphrase the words of ancient Roman wise Senator Juventus.

11 See: for example, article 3 of the International Covenant on Civil and Political Rights, 1966.

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ISBN 978-9966-7237-3-4



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James Jesse's book is essential reading for anyone who wants to grasp the scope of the freedom of speech for members of parliament and even the general populace in a democratic setting. The book provides valuable insights into why the freedom of speech for members of parliament is so important. One of the most important pivotal statements alluded in this book is that "freedom of speech is crucial in any democracy because open discussions of members are essential for voters to make informed decisions during elections. It is through speech that people can influence their governments' choice of policies." As we move towards realization of true democracy. This book is eminently readable and provides a vital resource to members of parliament academic lawyers and all others who are interested in knowing the freedom of speech.



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